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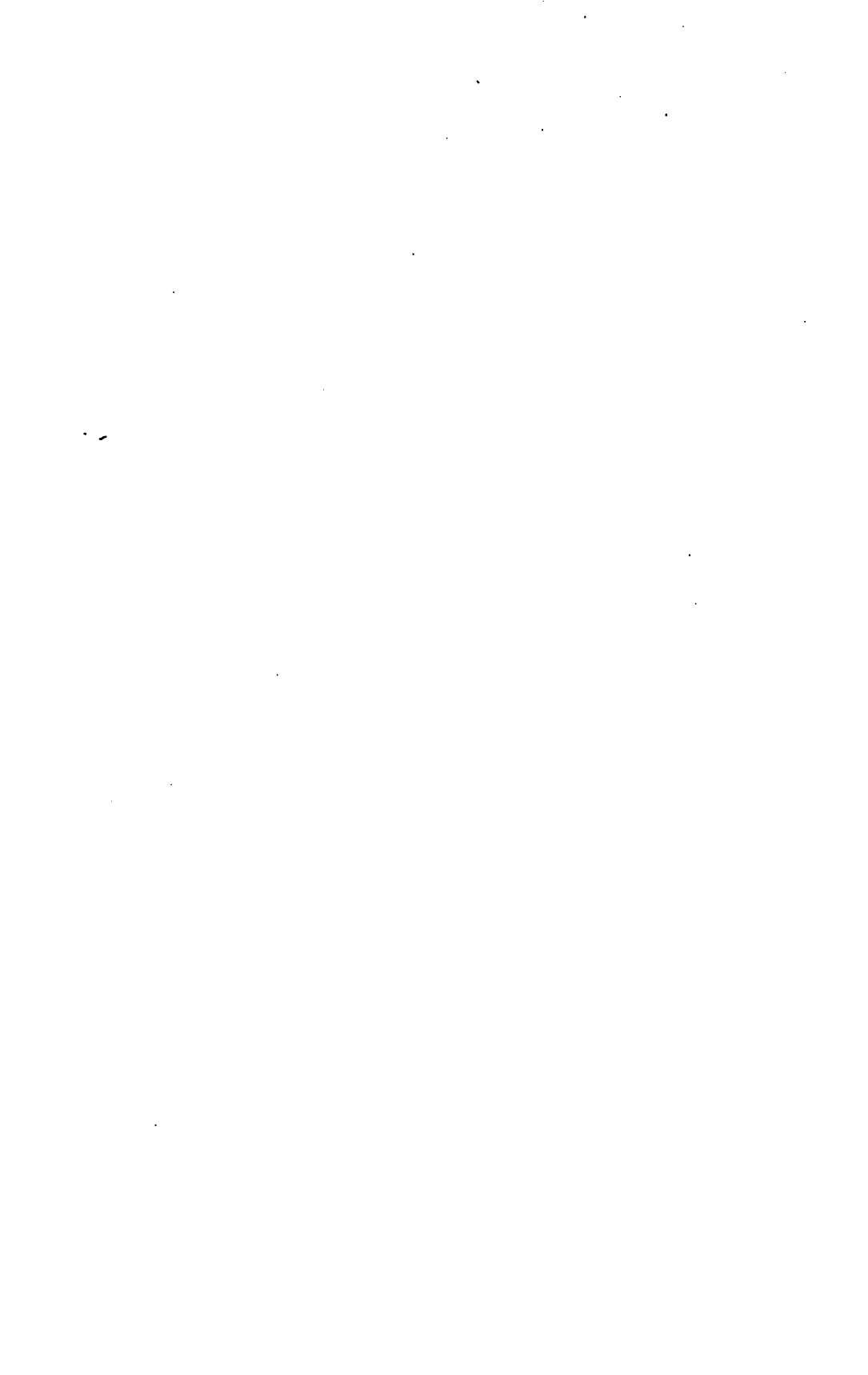
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REPORTS OF CASES
Ch. Bnt. ADJUDGED IN THE
HIGH COURT OF CHANCERY,

BEFORE

SIR WILLIAM PAGE WOOD, KNT.
VICE-CHANCELLOR.

By GEORGE W. HEMMING,
AND
ALEXANDER EDWARD MILLER,
OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.

VOL. I.

1862 to 1864:—26 to 27 VICTORIÆ.

LONDON:

W. MAXWELL, LAW BOOKSELLER AND PUBLISHER,
32, BELL YARD, LINCOLN'S INN.
HODGES, SMITH, & CO., GRAFTON STREET, DUBLIN.

1864.

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SIR ROBERT PORRETT COLLIER. } *Solicitors-General.*

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REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR:

COMMENCING IN THE

25TH YEAR OF THE REIGN OF HER MAJESTY,

1862.

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ATTORNEY-GENERAL *v.* CONSERVATORS OF
THE THAMES.

THORNTON *v.* SAME.

CITY OF LONDON BREWERY *v.* SAME.

CLOTHWORKERS' COMPANY *v.* SAME.

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November 14th,
15th, 17th, 18th,
& 24th.

Thames Conservancy Act,
1857 (20 & 21
Vict. c. 147)—
Nuisance—
Public and private Rights—
Jurisdiction.

THE first case was an information and bill by and at the relation of the *Fishmongers' Company*, the owners,

Under the *Thames Conservancy Act*, 1857, the Conservators were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty.

Held, that the Court had no jurisdiction to interfere by injunction at the suit of the Attorney-General, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere in a case where it was shown that the piers would be entirely useless.

The statute directed, that, whenever the Conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Watermen's Company, they should erect equally convenient stairs or landing-places in substitution for them.

Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the Conservators had prepared plans for piers which would interfere with such old stairs without showing any adequate provision in substitution for them, the Court would not assume that the duty would be neglected, and would not interfere at the suit of the Attorney-General to restrain the works until proper substitutes should be provided for the old stairs.

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and *Kough* and *Jones*, the occupiers, of *Fishmongers' Hall Wharf*, near *London Bridge*, for an injunction to restrain the Conservators of the river *Thames* from constructing or continuing certain piers and works at *Old Swan Stairs*, *All Hallows Stairs*, and *London Bridge Stairs*, and from obstructing the use of the said several public stairs, and from constructing or continuing the same or any other works so as to obstruct, impede, or interfere with the access or departure of vessels, barges, or boats to or from the Plaintiffs' wharves and landing-place, and from doing any act whereby the free use and enjoyment of the Plaintiffs of their ancient right or privilege of access to and departure from the said wharves and premises, or the easement, right, or privilege enjoyed by them under a certain grant or license from the Corporation of *London* might be obstructed, impeded, or interfered with.

The *Fishmongers' Company* had, for many years before the passing of the *London Bridge Approaches Act*, been seised in fee of the *Fishmongers' Hall* and adjoining land, and of a landing-place on the river front of the said premises. Under the provisions of the *London Bridge Approaches Act*, and the Amending Act, the Plaintiffs, in the year 1834, reclaimed and embanked a portion of the river adjoining their said premises, and became seised thereof in fee. The reclaimed land was called *Fishmongers' Hall Wharf*, and was leased by the *Fishmongers' Company*, in the year 1843, to the predecessors in title of the Plaintiffs *Kough* and *Jones*, the present lessees and occupiers of the wharf. In the year 1844 the Plaintiffs obtained from the

The statute contained, in sect. 179, a saving of all rights to which any owners or occupiers of any lands on the banks of the river, including the banks thereof, were by law entitled.

Held, that the right of access to a wharf was a private right within this saving; but that a pier, which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation enjoyed by the wharf-owner in common with the rest of the public, and that such right was not among those comprised in the statutory saving.

Information and bill by and at the relation of a wharf-owner, to restrain the erection of piers by the Conservators, dismissed without costs.

Corporation of *London* a grant or license to construct and permanently maintain a campshed in front of their wharf, projecting to low water mark, and the same was constructed at the Plaintiffs' expense.

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The Plaintiffs claimed, and enjoyed from time immemorial, free access from and to the river to and from their premises, which for the time being adjoined the river, with boats, barges, and other vessels, and the privilege of embarking and disembarking, loading and unloading, at the said premises.

In the year 1844 the Plaintiffs erected a steam-boat pier in front of their wharf, by driving piles into the bed of the river immediately outside the campshed, to which were moored dummies, connected by a bridge with the wharf.

The Corporation of *London* removed the pier, and the dispute was compromised by the grant of a license by the Corporation to the Plaintiffs to restore and permanently maintain the pier, paying a rent of 7*l.* 7*s.* for the privilege. The pier was accordingly restored, and, as the Plaintiffs alleged, had not obstructed, but had improved the navigation, by accommodating the steamboat traffic, and by deepening the river by the increased scour which it produced.

The bill alleged that the said pier did not materially obstruct or impede the access and egress to and from the Plaintiffs' wharves.

By the *Thames* Conservancy Act, 1857, the Defendants, the Conservators of the river *Thames*, were incorporated, and all the previous rights and powers, as well of the Corporation of *London* as of the Crown, in the bed, soil, and shores of this part of the river, and with relation to the

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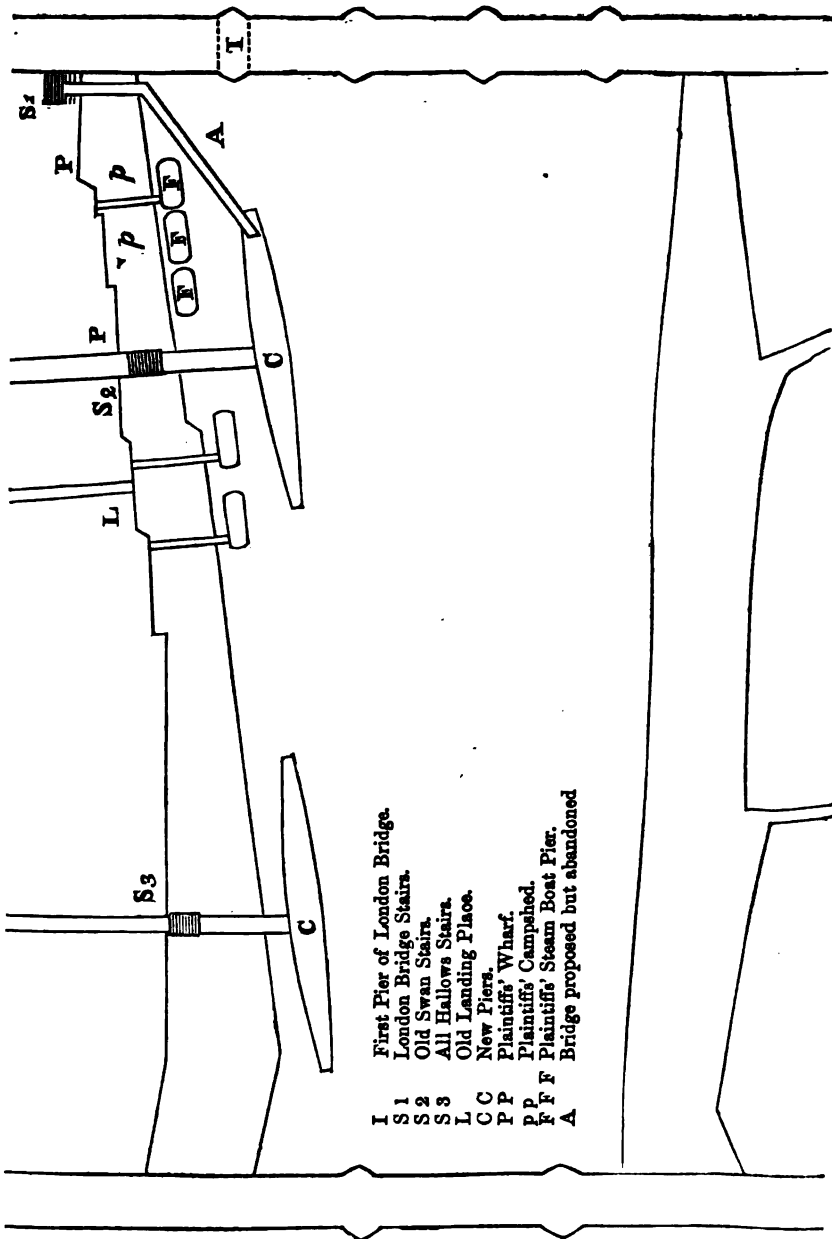
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conservancy of the river (with certain specified exceptions), were vested in the Conservators.

At the time of the passing of that Act, there existed on the north bank of the *Thames* three public stairs and landing-places, marked by the *Watermen's Company*—viz., *London Bridge Stairs*, immediately adjoining the bridge, *Old Swan Stairs*, at the foot of *Swan-lane*, a little higher up the river, and *All Hallows Stairs* at the foot of *All Hallows-lane*, still further up the river. There was also an ancient landing-place between *Old Swan* and *All Hallows Stairs*, which had become nearly disused, and was not so marked.

On the 20th of December, 1851, the Conservators advertised a notice of their intention to erect two floating steam-boat piers or landing places, hereinafter referred to as the lower and upper piers, respectively, opposite the *Old Swan* and *All Hallows Stairs*, respectively. Each pier was to be a T. shaped structure, consisting of a stage 300 feet long, parallel to the shore, resting on pontoons moored to piles, and connected with the shore at the site of the old stairs by a bridge. It was also originally designed to place another bridge to connect the lower pier with the *London Bridge Stairs*, but that part of the plan had been abandoned before the filing of the information and bill. The bridge at the upper pier was intended to rest upon the stairs, occupying thereby about two-thirds of their width, and leaving a passage of five feet in width for persons using the old stairs, which were also to be made steeper. The other stairs were to be interfered with in a somewhat similar way.

The general position of the works is shown by the plan on the opposite page :



- First Pier of London Bridge.
- I London Bridge Stairs.
 - S 1 Old Swan Stairs.
 - S 2 All Hallows Stairs.
 - S 3 Old Landing Place.
 - L New Pier.
 - C C Plaintiffs' Wharf.
 - PP Plaintiffs' Campshed.
 - FF F Plaintiffs' Steam Boat Pier.
 - A Bridge proposed but abandoned

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The following clauses of the *Thames Conservancy Act*, 1857, were referred to in the course of the argument :—

“ 1. The word ‘ pier,’ shall include a floating pier.

“ 57. It shall be lawful for the Conservators, from time to time, upon such terms, and upon the payment of a fair and reasonable consideration, such consideration to be either a sum in gross or an annual rent, or partly a sum in gross and partly an annual rent, and when a sum in gross such sum to be paid at the time of granting the licence, and under and subject to such rules, regulations, and restrictions as they shall think fit to impose, to license the erection by the owners or occupiers of lands adjoining the river, at the places where the piers or landing places hereinafter mentioned are to be erected, at any convenient places of piers or landing places, of such form and construction as the Conservators shall consider most advantageous to the public, and as causing the least obstruction to the navigation of the river *Thames*, and also to license the driving of piles, and the formation of dwarf wharfing ways and other conveniences to the adjoining premises, and also from time to time to cause the form and construction of such piers or landing places, and the position of such piles, and the mode of forming such dwarf wharfing ways and other conveniences to be altered at the expense of the owners of or persons licensed to erect, drive, or form the same, and also from time to time to cause any such piers or landing places, piles, dwarf wharfing ways, and other conveniences to be removed and taken away at the expense of the owners thereof, or of the persons licensed to erect, drive, or form the same, and in case such pier or landing place, piles, dwarf wharfing ways, or other convenience shall not be altered or removed within seven days after notice from the Conservators to alter or remove the same shall have been given to the owner thereof, or to the person licensed to

erect, drive, or form the same, or shall have been left upon or affixed to such pier or landing place, or any part thereof, such pier or landing place, piles, dwarf wharfing ways, or other convenience shall be liable to be abated and removed by the Conservators in the same manner as any other nuisance may be abated or removed under the authority of this Act.

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" 59. It shall be lawful for the Conservators from time to time, as they shall deem necessary for the convenience of the public, to erect at any convenient places, piers, or landing places, of such form and construction as they shall deem most advantageous to the public, and causing the least obstruction to the navigation of the river *Thames*, and also from time to time to alter and vary the form and construction of such piers or landing places, and also from time to time to shut up or take away and remove any such piers or landing places without being obliged to erect or provide any other pier or landing places in lieu of any so shut up, removed, or taken away.

" 62. Whenever the Conservators shall shut up, remove, or take away, or in any manner obstruct the free use and enjoyment of any existing public stairs or landing place, now marked by the *Watermen's Company*, they shall cause some equally convenient free public stairs or landing place to be erected or provided in the place or stead of the stairs or landing place so shut up, removed, or taken away, or the free use and enjoyment of which may be in any manner obstructed.

" 80. It shall be lawful for the harbour-masters for the time being to give directions for all or any of the following purposes (that is to say), for regulating the time and manner in which any vessel shall enter into, go out of, or lie in the river *Thames*, and the position, mooring or unmooring, placing, or removing any vessel within the same:—For

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regulating the manner in which any vessel shall take in or discharge its cargo, or any part thereof, or shall take in or deliver ballast within the river *Thames*. Provided always that it shall not be lawful for such harbour-master to direct that any vessel shall lie or be within any part of the river *Thames*, where by any Act of Parliament it shall or may be directed that no vessel shall lie or be, nor to unmoor or remove from any part of the river *Thames* duly appointed as a boarding, landing, or quarantine station, any vessel moored or placed there under the authority of the Commissioners of Customs, nor to moor or place any vessel within low water mark, of or alongside any quay, custom-house station, or other place appropriated to the service of the Customs.

“93. It shall be lawful for the Conservators to cut the banks of the river *Thames* for the purpose of making, enlarging, or repairing any dock, or canal, or any drain, sewer, or watercourse, or altering, laying down, or repairing any suction or other pipe, or for any other purpose whatsoever, or to permit and suffer any person to cut the banks for any of the purposes aforesaid, under such restrictions, and upon such terms and conditions as the Conservators shall think proper to impose.

“98. It shall be lawful for the Conservators, and they are hereby authorised and empowered, for the purpose of maintaining and improving the navigation of the river *Thames*, from time to time as occasion may require, to dredge, cleanse, and scour the river *Thames*, and to alter, vary, deepen, restrict, cleanse, scour, dredge, cut, enlarge, diminish, contract, shorten, widen, straighten, and improve the bed and channel of the river *Thames*, and to reduce or remove any banks or shoals whatsoever within the river *Thames*, and to abate and remove, or cause to be abated and removed, all impediments, obstructions, and annoyance, and

all nuisances and abuses whatsoever in the river *Thames*, or on the banks and shores thereof, which may now or at any time hereafter be injurious to the river *Thames*, or obstruct or tend to obstruct the free navigation thereof.

“99. It shall be lawful for the Conservators from time to time to remove, scour, and take away any shoal, mud-bank, or other accumulation which shall impede the navigation of the river *Thames*, and also to shorten any bend, or remove any angle in the course of the river *Thames*; and for such purpose to enter into agreements with the owners of land adjoining or in or near to the river *Thames* for the purchase of lands, or otherwise to enable them to effect the same.

“105. No works upon the bed or shores of the said river *Thames* below high water mark shall at any time be commenced or executed under the direction or with the sanction or permission of the Conservators without the same having been previously approved of by the Lord High Admiral or the Commissioners for executing the office of Lord High Admiral, such approval to be from time to time signified in writing under the hand of the Secretary to the Admiralty; or if such approval be not previously obtained without proper conditions being made, to provide for the immediate removal of all such works upon notice from the Admiralty under the hand of the Secretary requiring the same to be removed.

“165. Nothing in this Act contained shall extend or be construed or deemed to extend to prejudice or derogate from, or in anywise alter, affect, or interfere with the jurisdiction or authority of the Corporation of *Trinity House of Deptford Stroud*, in the county of *Kent*, in the appointment of pilots, loadsmen, and guides; or for lastage and ballastage, and office of lastage and ballastage of ships and vessels; beaconage and buoyage, and office of beacon-

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age and buoyage; or for the erecting and setting up of beacons, buoys, lights, and lighthouses; or the fees, advantages, salaries, profits, emoluments, commodities, and rights, incidents, and appurtenances whatsoever due, payable, accustomed, appertaining, or belonging to the said Corporation; or any other rights, offices, duties, and privileges whatsoever now subsisting and in force, and held, used, or enjoyed by the said Corporation under or by virtue of any Royal charter or charters, grant or grants, letters patent, Act or Acts of Parliament, or otherwise howsoever.

“168. Nothing in this Act contained shall extend to or be construed to extend to prejudice or affect any of the rights, powers, or privileges of any of the dock companies established under the authority of Parliament within the port of *London*, or any of the provisions contained in the several Acts of Parliament now in force relating to such dock companies, or any of them.

“177. Nothing in this Act contained shall be construed to extend to empower the Conservators to authorise or to grant licenses for the construction of any work, or to erect any pier or landing-places or other work, which shall in any way impede, obstruct, or injuriously affect any of the entrances to the ship-basin or dock of the company of proprietors of the *Regent's Canal* at *Limehouse*, or the regulation of any vessel which shall enter into or go out of the said ship-basin or dock, or lie in the river *Thames* at any of the entrances to the said ship-basin or dock, or within 100 yards from any of those entrances: Provided that the power of the Conservators and of the Harbour-Masters of the port of *London* within such limits shall not by anything contained in this Act be prejudiced, lessened, or interfered with, and nothing in this Act contained shall take away, prejudice, or affect any of the rights, powers, or privileges

of the said company of proprietors of the *Regent's Canal*, or any of the provisions contained in any of the Acts of Parliament relating to that company.

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"179. None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river are now by law entitled, nor to take away or abridge any legal right of ferry; but the same shall remain and continue in full force and effect as if this Act had never been made."

A large amount of evidence was gone into as to the nature of the inconvenience which would be caused by the piers.

The Plaintiffs insisted that the second arch of *London Bridge* was generally used at certain states of the tide by vessels making for the centre arch of *Southwark Bridge*, the alleged reason being that the set of the tide was in a curve which passed from the second arch close to the proposed pier, and so on to the centre of *Southwark Bridge*. The evidence of practical men was strongly in favour of this view, but the evidence of engineers who had experimented on the current was the other way. It was proved, however, that a considerable though not the principal traffic went through the second arch.

A similar conflict arose as to the extent to which the first arch was used by craft making for the wharves between *London* and *Southwark Bridges*. It was proved that it was used when available, but that it was often blocked by the steam-boats at the landing place immediately below *London Bridge*. As to the public stairs

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there was no question that they were in public use, but there was evidence to the effect that the five feet which it was intended to leave would suffice for the diminished boat traffic which had existed since the general introduction of steamers. It was scarcely disputed that the stairs would to some extent become less convenient. There was also some conflict as to the extent of the user of the old landing place which had been nearly abandoned, and on the question whether the right of the public did or did not extend both to goods and passengers.

It was scarcely denied that the Corporation of *London*, when acting as Conservators, had no power to grant a permanent license for piles obstructing the river, and the license actually granted appeared to have been revocable : it was not denied that the approach to the Plaintiffs' wharf would be less easy ; but it was said, that, by passing outside of the new lower pier, and warping round the dolphin at the end of it, it would be easy to make the wharf. For the Plaintiffs it was insisted, that, with a strong flood tide this would be nearly, if not quite, impracticable, and various experiments were in evidence on the point.

It was in evidence that the Admiralty had approved of the plans.

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Mr. *Rolt*, Q. C., Mr. *Bovill*, Q. C., and Mr. *Freeling*, for the Plaintiffs :—

The rights of the Plaintiffs which will be interfered with by the new piers are the right to mooring piles, the right to the campshed, and the right of access to their wharf.

The Conservancy Act gives no power to interfere with these rights. The 59th section enables them to erect convenient places, piers, or landing places, causing the least obstruction to the navigation. The 62nd section requires

them, whenever they shut up or obstruct any public stairs or landing-places, to cause some equally convenient free public stairs or landing-place to be erected in their stead.

Then the 179th section provides that nothing in the Act shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity of any owner or occupier of any river side lands, or to take away or abridge any right of ferry.

The questions, therefore, are, will the new piers obstruct the navigation? Will they obstruct the free stairs, and, if so, is any equally convenient substitute provided? Will they interfere with any right of the Plaintiffs comprised within the saving clause? Each of these questions must be answered in the affirmative. There is a mass of evidence, showing that a large proportion of the traffic goes through the second arch of *London Bridge*, that being preferred to the middle arch at certain times in consequence of the set of the tide. Traffic to the Plaintiffs' and other wharves, moreover, goes through the first arch, and the use of the first arch will be entirely impracticable, and that of the second much less convenient when the new piers are built. Therefore, the navigation is obstructed as well as the means of access to the Plaintiffs' wharf. Again, there are three—or, if the side gangway to *London Bridge Stairs* is abandoned, two—public stairs, of which two-thirds of the breadth will be taken away, and the approach both to them and the old landing-place will be greatly obstructed. This will not be questioned; and it is clear that no equally convenient substituted stairs are provided. A steam-boat pier is not a substitute for stairs. What the Act requires is something equally convenient as stairs, and this is not attempted to be given. You cannot set off the convenience of one class against the inconvenience of another, and say that though not equally convenient to persons landing from boats, the new piers

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will be more convenient to passengers by steam-boats. As to the old landing-place, there is no doubt it was used as a public landing-place for passengers. It is true, there is a conflict of evidence as to the right to land goods there; though even on that the weight of evidence is with us. It is no answer to say, that the landing-place is less used than formerly. It is used by the public; it is obstructed, and no substitute is provided. These are the grounds on which the information rests on behalf of the public.

As to the Plaintiffs' private rights the case is equally clear.

The right of access to their wharf is clearly a private right, distinct from the public right of navigating the river. Their right to the mooring piles and the campshed, resting on licenses granted by the then Conservators, are also private rights, and all these are saved by the 179th section.

In *Kearns v. The Cordwainers' Company* (a), the effect of this saving clause was considered; but there the erection complained of did not directly interfere with the access to the adjoining wharf, and all that the case decided was, that as a matter of fact the private right was not interfered with; but it was intimated by Mr. Justice *Crowder* that the saving clause was intended to apply to erections under the 59th section.

Rose v. Groves (b) is a distinct authority that the right of access to premises on the banks of a navigable river is a private right. *Leggins v. Inge* (c), shows that the licences under which we have erected the campshed and piles are not revocable; and it is clear that the proper remedy is by injunction in this Court: *Soltan v. De Held* (d).

If this interference with our rights is allowed, there is nothing to prevent the Conservators from shutting up some

(a) 6 C. B., N. S., 388.

(b) 5 Man. & G. 613.

(c) 7 Bing. 682.

(d) 2 Sim., N. S., 133.

of the most important docks altogether. Even if the right of approaching our own wharf is supposed to be not a private right, but a part of the public right of navigation, it is nevertheless saved by the 179th section, because the purport of that clause is to prevent any private injury; and an act causing particular damage to an individual by the violation of a right which he enjoys in common with the rest of the public is a private injury, for which an action will lie. But for the Act the building of the pier would be an indictable nuisance, like setting up telegraph poles or laying down tramways in a street; and the Conservators have no defence except what the words of the Act give them: *Mayor of Norwich v. Norfolk Railway Company (a)*.

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It is also to be observed, that, whatever damage they do, the Conservators are not bound to make compensation. The Lands Clauses Act is partially incorporated, but not so as to introduce the compensation clauses.

The three other bills were also opened, two of them by the same counsel, and the last by Mr. *Rolt* and Mr. *Boyle*. The allegations were of the same character as in the bill by the *Fishmongers' Company*. The following additional cases were cited: *Attorney-General v. Eastern Counties Railway Company (b)*, *London and Blackwall Railway Company v. Limehouse Board of Works (c)*, *R. v. Taunton (d)*, *River Dun Company v. North Midland Railway Company (e)*, *Lister v. Lobley (f)*.

Sir *H. Cairns*, Q. C., Mr. *Giffard*, Q. C., and Mr. *Cotton*, for the Conservators:—

The great mass of the evidence adduced by the Plain-

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| (a) 24 L. J., Q. B., 105. | (d) 3 Maule & S. 465. |
| (b) 2 Railw. Cas. 823. | (e) 1 Railw. Cas. 135. |
| (c) 3 K. & J. 123. | (f) 7 Ad. & E. 123. |

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tiffs is wholly beside the question. Even if it be true, (which we think is disproved), that the proposed piers are not the most convenient possible, it is clear that the 59th section makes the judgment of the Conservators absolutely conclusive on the point. Read by the analogy of the 57th section the discretion extends to the convenience of the place selected, as well as to the form and construction of the piers; and it would be absurd to suppose, that, in giving these large powers to the Conservators, checked by the supervision of the Admiralty, the Legislature meant to leave the one point, as to the choice of locality, to the judgment of a court of law. At any rate complaints founded on the mode of construction or the length and form of the piers have nothing to do with convenience of locality, and are in fact complaints that the Conservators and the Admiralty have not well exercised the unfettered discretion which is given to them. The Conservators (subject to the consent of the Admiralty) are empowered to erect at any convenient place such piers as they shall deem most advantageous to the public, and causing the least obstruction. The proposed piers are, in their judgment, in a convenient place, and are the most advantageous, and will cause the least obstruction possible. Beyond that you cannot go, for even if the convenience of the place be said not to be left to the discretion of the Conservators, it is not the most convenient place, or a place free from any inconvenience, but any convenient place; and it is enough to say that the word "place" obviously refers not to the precise ground covered by the pier, but to its general position; and no one doubts that considerable convenience would attend the erection of piers of some sort at *Old Swan* and *All Hallows Stairs*. So far, therefore, as the case proceeds upon the supposed non-compliance with the 59th section, there is nothing for us to meet.

It is said, that, if the Conservators have the power they

claim, they might do a great amount of public and private injury. No doubt they might; but the answer is, that they are a public body, in whose discretion the legislature has thought fit to trust. The Court always assumes, that, on questions of convenience or necessity, a public body like the Conservators will decide rightly, and refuses to interfere on a question of expediency where no mala fides is proved.

Then, as to the Stairs, we admit that we are bound by the 62nd section to provide equally convenient substitutes; but that is not until after we have obstructed the present stairs; and it is premature to raise this question. The clause is not framed like the corresponding clause in the Railways Clauses Act (a). There the making of the new road is a preliminary duty before interference with the old one. Here the provision of equally convenient stairs is a subsequent duty, which will not authorise the Court to grant a preliminary injunction. Upon the public ground, therefore, no serious case is made out for the information.

As to the private wrong complained of, it is clear that the bill will not lie, unless it can be shown that the case presented comes within the saving of the 179th section.

We may pass over the alleged interference with the campshed and mooring piles. As to the campshed, we have no intention of touching it; and it is not necessary to argue, what is otherwise plain enough, that the Corporation of *London* could not have granted, and did not profess to grant, anything more than a revocable license—revocable by them while acting as Conservators, and therefore also by the present Conservators, who have succeeded to the rights of the Corporation, and have large additional powers.

As to the piles, the same answer applies, though it is very possible, that, when our pier is ready, we shall require the Plaintiffs to remove theirs; at present, however, we

(a) Railways Clauses Consolidation Act, 1845, s. 53.

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have not called upon them to do so; and when we do, they may, if they are bold enough, attempt to set up their licence against us. All the mooring rights they can have as wharf-owners are to moor vessels for a reasonable time, for the purpose of loading, unloading, and the like. They have no right to obstruct the river with permanent dummies.

What then are the rights which a riparian owner can possibly have on the shores of a navigable river? He may, no doubt, acquire by grant or prescription rights of this character:—1. To discharge a stream or sewer into the river. 2. Franchise of wreck. 3. A several fishery. 4. Mill rights. 5. Right to the foreshore, or to have a creek into his land. 6. Right to be exempt from a general toll. I know of no other rights than such as these which can be appurtenant to the ownership of river-side property. It is to these rights that the 179th section is pointed; and any rights of this description which the Plaintiffs can prove are no doubt saved. That this is the scope of the clause, is confirmed by the separate saving of the right of ferry, which can only be claimed in respect of the ownership of the termini. If all rights (including the right of approach to their wharf) were saved by the general words of the clause, there would have been no need to add a special saving of the right of ferry. Ferry rights are, in fact, not water rights at all, but are only in respect of the landing place(a). What was meant was, to save all rights of property in the wharves as distinguished from rights of navigation, which are enjoyed by the wharf-owners in common with the public, and are nothing but public rights. The sort of cases to which the saving clause may apply, are those suggested by the 93rd, 98th, 99th, 165th, and 168th sections—interference with the banks, and removal of obstructions on the shore. In these matters, the privileges prescriptively acquired by the owners in respect of their own soil are to be respected.

(a) 13 Vin. Ab. 208, tit. Ferry.

The right on which the Defendants insist is what they call the right of access to their wharves. This is only the right of navigating the river in the neighbourhood of their wharves, and is a mere part of the public right until the barge is actually brought alongside, where the right of loading and unloading is no doubt a private right; but that is one with which our pier will in no way interfere. If this were a private right, the consequence would be, that the whole river would be lined and fenced with private rights, and the powers of the Act would be wholly nugatory. But it is no more a private right of the Plaintiffs to approach their wharf from *London Bridge* than to approach it from *Richmond*; and any obstruction to the navigation between *London* and *Richmond* would be as much an interference with their private right, as an obstruction within a few yards of their wharf. In both cases, it is the public right of navigation and that only which is interfered with. Being a public right, this is clearly within the powers given to interfere with the public rights at the discretion of the Conservators. It is exactly analogous to the right of a landowner to use a highway in approaching his own house, or that of a sea-side proprietor to navigate the sea up to his own part of the shore. All these are public rights which belong to all, and are not acquired by private user. If I approach my gate from a highway, the only right of access I have exercised is that of passing and repassing along the highway, which is the privilege of the whole public.

The authorities show that the right of access is not a private right. *Rose v. Groves*, which was relied on, does not prove the contrary; and the judgment of *Willes, J.*, in *Kearns v. The Cordwainers' Company*, is distinctly in our favour. So also the same principle is deducible from *R. v. Bristol Dock Company (a)*, *Wilkes v. Hunger-*

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(a) 12 East, 429.

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ford Market Company (a), Bright v. Walker (b), Brownlow v. Tomlinson (c), Elwood v. Bullock (d), Hawkins v. Gathercole (e), Spencer v. London and Brighton Railway Company (f), Caledonian Railway Company v. Ogilvy (g).

It is true, that a particular injury resulting from an interference with a public right may be made the subject of an action, and this is all that any of the cases relied on by the Plaintiffs show. They do not show that the rights infringed were treated by the Court as private rights.

The result is, that if the Plaintiffs are injured, it is by an interference with public rights—that interference being expressly sanctioned by the Act, and being exercised by the Commissioners in a manner which they in the exercise of the discretion vested in them have found to be for the public benefit.

Mr. Rolfe, in reply, in all the cases :—

In the first place, I take issue on the assertion (for it is no more) on the part of the Defendants, that the right of access from a road or a river to a private house or a private wharf is a public right. I say that such a right of access is distinct from the public right of using the road or river, and is essentially a private right. The test is this: Can any one, except the owner of the house or wharf, use the road or the river for the purpose of access to the house or wharf? Clearly not without the owner's permission; and he in so using the highway is using it by virtue of his special private right, which is quite distinct from the common right of the public.

Suppose the level of a road were altered, so as to improve

- (a) 2 Bing. N.C. 281.
- (b) 1 Cr. M. & R. 211.
- (c) 1 M. & G. 484.
- (d) 6 Q. B. 383.

- (e) 6 D. M. G. 1.
- (f) 8 Sim. 193.
- (g) 2 M'Q. Scotch Cases, 229.

it for public use, but at the same time to make the access to an ancient house impracticable?—would not the owner's private right be infringed? and what would that right be except the right of access analogous to that which is infringed in this case?

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They say, Parliament has given them the power of obstructing the public right of navigation; but they can't exercise this power, if by so doing they interfere also with my private right of access, or with any private right incidental to the public right. This is expressly enacted by the 179th section.

The legislature preserves the incident, even where it destroys the principal right to which it is annexed.

[VICE-CHANCELLOR.—How do you describe your right? Is it a right of landing, or a right to have the whole river clear from an unlimited distance up to your wharf? In *Roe v. Groves* the actual landing was made impossible.]

Mr. Roll.—What we claim is, the right of access to our wharf. We have a right to turn our barges, as we have been accustomed to do, from the second arch of *London Bridge* into a position in which they will lie alongside our wharf without any physical obstruction.

It is said, that, if our claim succeeds, there may be so many others all along the river as to defeat the important public objects of the Act; but that is the argument which failed in the case of the *Birmingham Board of Health: Attorney-General v. Council of Borough of Birmingham*(a). If the Act is not large enough to effect its purpose, the Court can't enlarge it at the expense of private rights.

Another argument was this: Certain rights, such as those

(a) 4 K. & J. 528.

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dealt with by the 93rd, 98th, and other sections, were pointed out as appropriate subjects of the operation of the 179th section. But that does not exclude all other operation, and the mention of ferry rights shows that water rights were not excluded from the saving, for this is a water right, and the special mention of this case is explained by the fact, that it was not, like the general rights before saved, an owner's right, but one which might be acquired by anyone: *Peter v. Kendal* (a).

Then, as to the obstruction of the stairs, the question does not turn upon whether the condition of providing substitutes is precedent or subsequent, because the Defendants have produced their plans, and they contain no provision whatever to supply equally convenient stairs. The intention to interrupt the use of the old stairs without providing proper substitutes, is proved, and in fact not disputed; and the *Attorney General* has therefore a right to an injunction on this ground, the more so, as no other remedy by mandamus or otherwise is available, and a mandatory order is necessary, as in *Storer v. Great Western Railway Company* (b).

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VICE-CHANCELLOR SIR W. PAGE WOOD.

These are cases of considerable interest in themselves, and in the argument of which questions of very great importance have been raised. The first case, that of the *Fishmongers' Company*, is on an information and bill, and involves the double question, whether the operations of the Conservators are an infringement of the rights either of the public or of the Plaintiffs as owners of river-side property. The other three cases are raised only by bill, and relate exclusively to the alleged private injury to the Plaintiffs, the wharfingers.

(a) 6 B. & C. 703; Saville, 11, pl. 29. (b) 2 Y. & C. 48.
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 (✓)

The information and bill in the case of *The Attorney General v. The Conservators* is framed on this principle. So far as it is the information of the *Attorney General*, it complains that the Conservators, purporting to act under the authority of their Act, are about to construct two piers, which would interfere with the rights of the public in a manner which the statute does not authorise. In the first place, it is said that the construction of these piers in the manner proposed will be a nuisance and impediment to the navigation of the river, such as the Conservators are not authorised to create. There is also another grievance, of which the *Attorney General* complains, namely, that certain public stairs are intended to be obstructed without any provision being made, as required by the statute, to replace them. These are the general grounds of the information, with which I will deal first, before touching upon the case of private injury, which is set up by the Bill.

By the 59th section of the *Thames Conservancy Act*, the Conservators are authorised "from time to time, as they shall deem necessary for the convenience of the public, to erect, at any convenient places, piers or landing-places of such form and construction as they shall deem most advantageous to the public, and causing the least obstruction to the navigation of the river *Thames*."

In order to ascertain the exact scope and purpose of the powers conferred by this clause, it is right to turn to the preamble of the Act. That recites the existence of litigation between the Corporation of *London* and the Crown ; and that an agreement had been come to for settling the said disputes, by the withdrawal on the part of the Corporation of all claim to the bed of the river, and by other arrangements therein specified ; and goes on to recite, that the public enjoyed certain rights and privileges for the navigation and use of the river ; that encroachments had been made on the shores, which it was desirable to remove ;

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and that, in consequence of the great increase of steam navigation, it had become necessary to provide safe and convenient places for embarking and disembarking steam-boat passengers; and that for these beneficial objects it was expedient that the whole regulation of the river *Thames* should be under one uniform management and supervision of a permanent body of Conservators having all powers necessary for that purpose; and that all the powers then vested in the Corporation should be transferred to the Conservators to be appointed by the Act. Then the Act proceeds to incorporate the Conservators, the intent being that they should have power to remove encroachments, to provide landing-places for steam traffic, and generally to regulate the navigation and use of the river.

Now it cannot be denied that any pier or other projection into a navigable river is a nuisance. Before the passing of the *Thames Conservancy Act*, the Corporation of *London* had nevertheless taken upon themselves to grant licenses to wharf-owners for such purposes; of which it is enough to say, that their validity had been strongly questioned. In *Att. Gen. v. Johnson (a)* the Defendants justified a nuisance of this kind by virtue of a licence from the Corporation; and Lord *Eldon* said, that it was his then opinion that the Crown had not the right to use its title to the soil between high and low-water mark so as to occasion a nuisance; that therefore it could not give such a right to the City, nor could the City transfer it to any other person.

I have thought it well briefly to refer to this point, because it was suggested in the argument that a question might be raised upon it, though it was not much pressed. It appears to me to be the better view, to assume that the City never had any direct power to grant such licences, and that the proposed piers will be a nuisance (although

(a) 2 Wilson, Ch. R. 87.

the Conservators have succeeded to all the rights of the Corporation), unless the scheme comes within the authorisation contained in the 59th section of the statute.

The Conservators, for the purpose of providing landing-places for steam-boat passengers, are proceeding to construct piers which run out beyond low water-mark, terminating in pontoons which support stages, parallel to the shore, of a considerable length. There is no doubt that these landing-places will be very convenient for the steam-boats, but at the same time they will clearly be to some extent prejudicial to other traffic. That is in a manner denied, but I think it is beyond all doubt that some inconvenience will be occasioned; and the first question is, whether this can be justified by the 59th section.

It is clearly impossible to carry the power of the Act into operation without causing some inconvenience to some part of the river traffic; but it is contended, that, having regard to the general convenience of the whole public, these piers cannot be said to be "erected at convenient places," and that the directions of the 59th section have been disregarded. It is to be observed, that the objection must be based entirely on the direction that the piers are to be "at any convenient places;" for, subject to the approval of the Admiralty, which is required by the 105th section, and has been given to these plans, the form and construction of the piers are left to the discretion of the Conservators. They are to be such as the Conservators "shall deem" most advantageous, and causing the least obstruction. That goes a long way towards determining the question which I am now considering, because it is conceded that landing-places are required, and the form which they are to take is left, as I have said, to the discretion of the Conservators, subject to the consent of the Admiralty. Mr. *Boyle*, indeed, suggested that the 59th section did not authorise floating

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piers, but the interpretation clause defines "pier" to include a floating pier. It is clear, therefore, that floating piers may be constructed under the 59th section, projecting into the river in a manner which, but for that clause, would be a nuisance. The mere fact, therefore, that these piers project into the stream is not a legitimate subject of complaint, although that projection is so far "not convenient" as to amount in its nature to a nuisance. This cannot be the sense in which the Act uses the term "any convenient place."

But it is said that in another sense the proposed piers are not in convenient places, because they are so close together as to occasion needless inconvenience to the navigation. Assuming for the moment that some additional inconvenience is caused by this arrangement, I must say that I cannot read in this clause any intention to leave it to this Court, or to the Court of Queen's Bench on a mandamus, to determine what plans would be convenient for the purpose. It would be a forced and narrow construction of the Act to say, that, while the form and construction of piers are left to the Conservators, this Court is made the judge of the convenience or inconvenience of the particular spot selected as the site of a pier. The words "in any convenient place" appear to be thrown in as pointing out that the general convenience of the public is to be regarded; and this certainly is done, so far as steam-boat passengers are concerned, though other portions of the public may suffer some inconvenience. But there is nothing to satisfy me, that the inconvenience is of such a character as would justify the intervention of this Court, even if it had jurisdiction, which I do not think that it has. The legislature having entrusted this body of Conservators with the execution of works referred to in the Act, subject to the approval of the Admiralty, and given them large powers for the purpose, it would be a very narrow construction to hold that it was left to this or any Court to determine the precise locality where a pier

should be placed, unless perhaps in a case where it was proposed to put a pier in a place where it would be absolutely useless. Even in that case I should doubt whether the legislature must not be taken to have trusted to the Conservators not to do anything so absurd as this would be; but, at any rate, I am satisfied that nothing short of such an absurdity as I have supposed could justify the interference of this or any other Court.

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Another ground of complaint on behalf of the public was urged, which is entirely distinct from the alleged inconvenience of the proposed piers. It is based upon the provisions of the 62nd section, which directs, that whenever the Conservators shall obstruct the free use of any existing public stairs or landing-places marked by the *Watermen's Company*, they shall cause some equally convenient free public stairs or landing-place to be erected or provided in place of that the free use of which may be in any manner obstructed. The argument founded on this section must be limited to the *Old Swan* and *Allhallows Stairs*, because the other ancient landing-place referred to was not marked by the *Watermen's Company*, and is not within the clause. It is, therefore, unnecessary to discuss the question whether the terms landing-places and stairs are used in the Act to signify the same or different things, because what we have to deal with at *Old Swan* and *Allhallows* are simply stairs, and to these the section distinctly applies. It is not quite clear in the evidence what is intended to be done with the *Old Swan Stairs*. But there is no dispute that *Allhallows Stairs* are to be removed; and it is obvious that the substitution of steeper and narrower steps, as the plans seem to contemplate, would not be a provision of equally convenient stairs. It is said, indeed, that the landing-place on the pier itself would be as convenient as the old stairs. But, apart from the fact that it cannot be equally convenient to land goods

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at floating piers as at the old stairs, this is not what the legislature meant in directing, that some equally convenient free public stairs or landing-place shall be substituted for any public stairs or landing-place which may be obstructed.

But the question of law which arises upon the 62nd clause is this,—whether it is not competent for the Conservators to remove the old stairs before providing the equally convenient substitutes which the Act requires. On this view, there would be no illegality in the removal of the old stairs, though by doing so the Conservators would subject themselves to the obligation of providing an equally convenient substitute at a future time. If they neglected to perform this duty the remedy would be by a mandamus in the Queen's Bench, when the proper time arrived; but in the meantime this Court would have no jurisdiction to interfere by a preliminary injunction. In support of this contention, it is to be observed that there is a marked contrast between the language of this Act and that of the Railway Acts, which prohibit the removal of a road until after a substituted road shall have been provided. The statute now under consideration appears to contemplate something being done after the removal of any public stairs, and, as a consequence, casts upon the Conservators a corresponding duty. Indeed, it was contended by Sir *Hugh Cairns* that the directions of the Act could not, on any other construction, be followed in any case where the substituted stairs were intended to occupy the same site as those which it might be necessary to remove. It would be impossible, in such a case, to avoid a temporary obstruction to the old stairs while the work was going on. I was not much impressed with this argument, because it may be assumed to be always possible to erect public stairs on some neighbouring site; and in every case where the Conservators might wish to occupy with a new pier the site of any old stairs, they might be supposed to have ascertained, in

the first instance, that it was practicable to erect equally convenient stairs in the vicinity. But the only question for me is, whether the apparent want of any such provision in the plans which have been prepared is sufficient to justify this Court in interfering by injunction ; and having regard to the manner in which the clause is framed, so entirely different from the corresponding provisions of the Railways Clauses Act, I think the condition must be read as a condition subsequent, to be performed after the removal of the old stairs under the powers conferred by the statute. The case of *Hutton v. London and South Western Railway Company* (a) affords a nearer analogy than the obstruction of roads under the provisions of the Railways Clauses Act. Mr. *Rolt* took this distinction, that, in *Hutton's case*, and in *Lister v. Loble* (b), on which Vice-Chancellor *Wigram* relied, it was impracticable to ascertain the compensation before commencing the works ; whereas here, the test of equal convenience could be applied to the substituted stairs before the old stairs were touched : but the answer to all such arguments is, that here the legislature has not thought fit to impose a condition precedent ; and I am not authorised to interfere, although it may be a matter of doubt whether the Conservators will perform the duty, which will fall upon them in consequence of the execution of the works which they contemplate. It is insisted, that the Conservators evidently do not intend to do what the Act requires of them, because they have contended that their plans as they stand will afford all the convenience which is derived from the existing stairs. I have already expressed my opinion that that would not be so ; but I do not think that this would justify me in granting a mandatory injunction, unless it were plainly made out that it was impossible to obtain relief by mandamus or any other shape. In *Storer v. Great Western Railway Company*, there was

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(a) 7 Hare, 259.

(b) 7 A. & E. 123.

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no possibility of getting the bridge made unless by means of a mandatory injunction, because the work had to be done on the land of the Defendants; and under these circumstances the Court considered itself justified in making the mandatory order.

On both of the grounds, therefore, which were urged, I am of opinion that the Information fails.

The question upon the Bill was very ingeniously argued on both sides, and turned upon the position in which the Plaintiffs were placed by the saving contained in the 179th section. The Act contains a number of special savings in favour of particular persons and corporations, and concludes with this general saving clause: "None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity, to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this Act had never been made."

In construing this section, it is necessary to approach the question with the knowledge of the purpose for which the Act was passed. That purpose was to enable the Conservators to erect piers, which would necessarily have been nuisances at law, unless authorised by the Act. That being so, those persons who occupy the banks of the river, and have the most frequent occasion to navigate it, must be specially inconvenienced; and to say that the Act intended to prohibit any obstruction to the river, of which, independently of the Act, any of the river-side owners could have complained, would be to say, that the statute should have no operation at all. If the Act had saved every

right which the owners of river-side property previously possessed, nothing could be done under it, because every one who could show particular damage to himself would have a right of action in respect of an infringement even of a public right, as being a person specially injured; and there could scarcely be any interference with the general right of navigation, which would not cause special damage to some of the riparian proprietors. Such an interpretation of the statute would neither be proper nor rational.

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On the other hand, the Defendants put their case far too high. They say, that, if in the execution of their works they should altogether block up the passage of the river, and prevent the possibility of access to the Plaintiffs' wharf, the *Fishmongers' Company* would have no right under the saving clause, because the injury they would suffer would be part only of the general nuisance which the Conservators are authorised to inflict on the public in the execution of their powers. They contend that such damage, however serious, would not be within the purview of the saving clause.

Now, I apprehend that the right of the owner of a private wharf, or of road-side property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river. The existence of such a private right of access was recognised in *Rose v. Groves* (a). As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the Plaintiff, but upon the principle that a private right of the Plaintiff had been interfered with. The Plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the Defendant had placed in the river; and it would be the

(a) 5 M. & Gr. 613.

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height of absurdity to say, that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In *Rose v. Groves*, Chief-Justice *Tindal* put the case distinctly upon the footing of an infringement of a private right. He says:—"A private right is set up on the part of the Plaintiff, and to that he complains that an injury has been done;" and then, after stating the facts, adds, "it appears to me, therefore, that the Plaintiff is not complaining of any public injury."

The case of *Kearns v. The Cordwainers' Company* (a), did not determine anything as to the validity of the extreme view insisted on by the Defendants. It was a question upon the award of arbitrators, who directed certain steps to be taken, which it was alleged would create a nuisance; and the effect of the judgment was, that there would be no nuisance. And it is clear that there was nothing before the Court to show that the adjoining wharves would be entirely closed. If it had been so, the case would have been like *Rose v. Groves*.

Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time inter-

(a) 6 C. B., N. S., 338.

fering with the other, this does not alter the character of the right. In *Rose v. Groves*, one way of meeting such difficulties is suggested by the supposition of an obstruction being placed in a part of the river which was not navigable. It is not necessary, however, to do more than allude to this contention to make my view intelligible. In fact, the case does not raise any such extreme question. The *Fishmongers' Company* say, that they have a right to this wharf, coupled with a right of access to the river; and I agree, that if this access were taken away, they would be within the provisions of the 179th section, and would be entitled to an injunction. But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access. Persons who frequent either this or any other wharf will be impeded, to a certain extent, in the navigation of the river; but that is an injury to the general right of navigation. It amounts only to this, that the Plaintiffs' goods will have to take a longer and less convenient course in coming up to their wharf; an inconvenience the same in kind, though not in degree, as that which the rest of the public will be exposed to. The right interfered with is not the private right of access, which still remains, but the right of approaching from a distance, which forms part of the public right of navigation.

That view brings the case within the class of authorities referred to in *Kearns v. The Cordwainers' Company*, and does not in any way militate against the judgment in *Rose v. Groves*, where the private right of access was distinctly interfered with.

The same considerations apply to the case made with respect to the campshed, assuming this right to have a

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legal existence. There is no interference beyond this, that the navigation will be impeded ; and this is not a disturbance of the private but of the public right.

The other Bills, of *Thornton* and of the *City Brewery Company*, stand in much the same position as that of the *Fishmongers' Company*. The only distinction is this, that *Thornton* alleges that he was in the habit of using the *Old Swan Stairs* ; and the *City Brewery Company* say, in like manner, that they were accustomed to make use of *Allhallows Stairs*. These rights, it is said, will be interfered with ; but having held, that the *Attorney-General* on behalf of the public is not entitled to restrain the proposed interference with the public stairs, I must, for the same reasons, refuse to interfere on behalf of private wharf-owners. The case of the *Clothworkers' Company* is perhaps the strongest of all as to the extent of the interference ; but it is not attempted to be put so high as to say that the access is entirely taken away, nor does it appear that goods may not be landed as readily as heretofore. The only injury is, that the river in the immediate vicinity of the wharf cannot be navigated as conveniently as before. But I think that that is a distinct right from the private right of access ; and by so holding, I am able to reconcile the valuable decision in *Rose v. Groves* with the other authorities referred to.

In the *Fishmongers'* and *Thornton's* case one other point was pressed, namely, that, in consideration of a rent, an irrevocable licence had been granted by the City for the use of a campshed, and for the establishment of piers and dummies. The *Fishmongers' Company* too admit, and it is sufficiently clear from the evidence, that the real interest of these suits centres upon the dummies which have been profitably used as steam-boat landing places ; but I do not find a single authority to justify me in saying that the claim to place dummies in the stream is a matter which

the Corporation of *London* or the Conservators have bound, or could have bound, themselves never to interfere with. A licence was granted to *Thornton* at a rent of £3 : 3s, but nothing was said as to whether it was to be revocable or not. Neither is there any evidence of an intention on the part of the Conservators to interfere with his dummies. The question really reduces itself to that which I have already decided with respect to the wharves. There is an obstruction to the rights enjoyed by the different Plaintiffs, but it is only to their right of approaching their several wharves, which is part of the public right of navigation.

For these reasons, I cannot sustain either the Information or any of the Bills; but I think it is not a case for costs. The questions involved were such as might reasonably be brought before the Court, and there is no doubt that substantial injury has been suffered, though under the authority of the statute. The Information and Bills will therefore be dismissed without costs.

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Nov. 12th, 14th.

Power—Ap-
pointment in
Excess—Re-
moteness—Life
Interest—
Hotchpot.

Under an exclusive power to appoint a trust fund of stock to children and their issue born during the lives of the donees of the power, with a hotchpot clause, an appointment was made to five daughters out of nine children, whereby the trustees were directed, after the death of the parents (tenants for life) to stand possessed of the fund upon the trusts following: that is to say, upon trust thereout to appropriate one-fifth part to and for the benefit of each daughter, and to pay and apply the income of the share of each daughter for her separate use; and after the decease of each daughter, upon trusts for the benefit of her children:—
Held, that the limitations over being void, the daughters took life interests only, subject to account for the value under the hotchpot clause.

RUCKER v. SCHOLEFIELD.

THIS was a bill filed by trustees for the administration of the trusts of a settlement, dated the 23rd of September, 1809, on the marriage of *Jeremiah Scholefield* and *Margaret Holmes*.

After giving life interests to the husband and wife in a sum of £6,000 Navy 5l. per cents, the settlement declared the trusts of the stock as follows:—"In trust for and for the benefit of all and every or such one or more exclusively of the other or others of the child or children of the body of the said *Margaret Holmes* by the said *Jeremiah Scholefield* to be begotten, or of the issue of any such child or children born during the lives or life of the said *Jeremiah Scholefield* and *Margaret Holmes*, or of the survivor of them, at such ages, days, or times, and, if more than one, in such parts, shares, or proportions, and with the whole or any part or parts of such interest, dividends, or annual proceeds as aforesaid, for or towards the maintenance of any such child or children or issue as the husband and wife should jointly appoint."

Then followed, limitations in default of appointment to the sons at twenty-one, or death under twenty-one leaving issue, and to the daughters at twenty-one or marriage, in equal shares, with a proviso that "no child taking under any appointment to be made in exercise of the aforesaid powers, or either of them, shall be entitled to any share of the unappointed part of the said trust fund, without bringing his or her appointed share into hotchpot and accounting for the same accordingly, unless such appointment shall contain an express direction to the contrary."

There were four sons and five daughters of the marriage, all born before the date of the next-mentioned deed.

By a deed-poll, dated the 22nd of October, 1844, Mr. and Mrs. *Scholefield* appointed as follows:—That the trustees shall stand possessed of the fund from the decease of them the said *Jeremiah Scholefield* and *Margaret* his wife, upon the trusts following, that is to say, upon trust thereout to appropriate one-fifth part thereof to and for and for the benefit of each and every one of them, *Katherine Margaret*, *Sophie Maria*, *Julia Susannah*, *Elizabeth Charlotte*, and *Ellen Gertrude* [the five daughters], exclusively of all other the children of them the said *Jeremiah Scholefield* and *Margaret* his wife, and to pay and apply the interest, dividends, and annual proceeds of each such one-fifth part or share unto, or permit the same to be received by, each and every of the said several children, for her own sole and separate use, independent of and wholly exempt from the debts, control, and engagements of any husband with whom she may intermarry, the receipt or receipts of such daughter being a good and sufficient discharge or discharges to the said trustees or trustee for the time being, under the hereinbefore recited indenture of the 23rd day of September, 1809. And upon trust, from and after the decease of each such daughter, to pay, apply, and dispose of the said fifth part or share of such daughter so dying, unto and amongst the children of such daughter so dying, or their issue, in such shares and at such times as such daughter (notwithstanding any coverture) shall by her last will and testament, or any writing of appointment in the nature thereof, direct or appoint, give or bequeath the same; and in default of such appointment, gift, or bequest, unto or equally between or amongst all and every the child or children of such daughter, if more than one, share and share alike, and their respective issue, such issue, nevertheless, taking equally among them a parent's share only, and to be paid on their respectively attaining the age of twenty one years, with the interest of their respective portions in the meantime, for their maintenance, clothing, and education, and in case of the

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death or failure of issue of any one or more of them, the said *Katherine Margaret, Sophie Maria, Julia Susannah, Elizabeth Charlotte*, and *Ellen Gertrude*, then the parts or shares of her or them so dying as aforesaid shall be in trust for such of the sisters of such daughter or daughters as shall be then living, and the issue of such of them as shall be then dead leaving lawful issue, such issue, nevertheless, taking equally amongst them a parent's share only, and if more than one, in equal shares; but in case all such daughters shall happen to die without leaving lawful issue, or, having such, they shall all die under twenty-one years and without issue, then in trust to pay and divide the said capital sum of £6,000 Navy 5l. per cent. Annuities, or the stocks, funds, and securities in or upon which the same may be then invested, unto and equally between such of the sons of the said *Margaret Scholefield* and by the said *Jeremiah Scholefield* begotten as shall be then living, and the issue of such of them as shall then be dead leaving lawful issue, such issue, nevertheless, taking equally among them a parent's share only, and if more than one, then in equal shares. Provided, nevertheless, that the said trustees shall hold the said capital sum of £6,000, and the interest, dividends, and annual proceeds thereof, subject to such of the trusts, powers, provisions, declarations, and agreements concerning the same in the said recited indenture contained as are undetermined and capable of taking effect.

The husband died in the year 1846, and the wife in the year 1861, leaving the said four sons and five daughters surviving.

All the sons and daughters had long since attained twenty-one; all the daughters were of age at the date of the appointment, and one of them had several children.

Argument.
 —

Mr. *Wickens*, for the Plaintiffs, the trustees.

Mr. *Hobhouse*, Q. C., and Mr. *Currey*, for the sons :—

The appointment is bad altogether, the limitations over being in excess of the power and too remote, and the gift of life interests inconsistent with the hotchpot clause : *Alexander v. Alexander* (a). If not wholly bad, the appointment is clearly in excess and remote, after the life interests of the daughters. The fund, therefore, will go either entirely, or at any rate subject to those life interests, as in default of appointment. *Reid v. Reid* (b) supplies the distinction between cases like the present and *Carver v. Bowles* (c), and *Kampf v. Jones* (d).

Lord *St. Leonards* (e) points out that the principle of *Carver v. Bowles* must be applied with caution, and only in a case where there is a clear absolute gift.

[They also cited *Doe v. Eyre* (f), and *Neatherway v. Fry* (g).]

[The VICE-CHANCELLOR mentioned *Mayer v. Townsend* (h).]

Mr. *Daniel*, Q.C., and Mr. *H. Stevens*, for the daughters and the grandchildren :—

There is an absolute gift, to be implied from the language of the will ; and then the subsequent void modifications leave the gift subsisting, on the principle of *Carver v. Bowles*. [They also cited *Harvey v. Stracey* (i), *Routledge v. Dorril* (j), *Bray v. Hammersly* (k), *Fry v. Capper* (l), *Thornton v. Bright* (m), *Phipson v. Turner* (n).] At any rate, the daughters take without bringing their life interests into hotchpot.

(a) 2 Ves. sen. 640.

(b) 25 Beav. 469.

(c) 2 R. & M. 301.

(d) 2 Keene, 756.

(e) 2 Sugd. Pow. 74, 7th Ed.

(f) 5 C. B. 713.

(g) Kay, 172.

(h) 3 Beav. 443.

(i) 1 Dr. 73.

(j) 2 Ves. jun. 356.

(k) 3 Sim. 513.

(l) Kay, 163.

(m) 2 My. & Cr. 230.

(n) 9 Sim. 227.

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Mr. *Elderton* and Mr. *H. B. Miller*, for other Defendants, incumbrancers.

Mr. *Hobhouse*, in reply :—

The Defendants can only force a construction favourable to their view, by appealing first to the doctrine that void limitations superadded to an absolute gift leave the gift untouched. But before applying the rule of law, you must first find the absolute gift, by the construction of the will taken by itself: *Cattlin v. Brown* (a). There is nothing of the kind to be found here; whereas, in *Harvey v. Stracey*, there was a clear absolute gift in the first instance, and what was rejected was mere supplementary direction, which could not take effect.

Here, the only gift is in the direction to trustees to hold upon a series of trusts of which all but the life interests are void.

As to the operation of the hotchpot clause, the life interests must be valued, and the daughters' shares of residue reduced accordingly.

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 ———
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this cause is as to the effect of an appointment purporting to be in pursuance of a power contained in a marriage settlement, by which the husband and wife took a joint power of appointment in favour of any of the children of the marriage, or of their issue born during the lives or life of the husband and wife or the survivor.

The appointment made under this power is manifestly invalid as to the limitations over after the death

(a) 11 Hare, 372.

of the daughters ; and the question is, whether the appointment can be supported, on the principle of *Carver v. Bowles* and that class of cases, as an absolute gift to the daughters, or whether they take only life interests, leaving the fund subject thereto to go as in default of appointment.

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 Judgment.

In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to shew that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled ; in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So, if you find a clear gift followed by words which affect to divest it, and the limitations over are inoperative, then the Court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law.

The question is, to which of these two classes the instrument under consideration belongs. The trusts declared by the deed of appointment are, first, " to appropriate one-fifth of the principal to and for and for the benefit of " each of the daughters, exclusively of the other children ; and if these words stood alone, they would suffice to vest the absolute interest in the five daughters ; but the clause runs on thus, " and to pay and apply the interest, dividends, and annual proceeds of each such one-fifth part or share unto or permit the same to be received by each and every of the said several children for her own sole and separate use ;"

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 ———
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"and upon trust from and after the decease of each such daughter to pay, apply, and dispose of the said fifth part or share of such daughter so dying unto and amongst the children of such daughter;" and then follow the limitations, which are clearly bad.

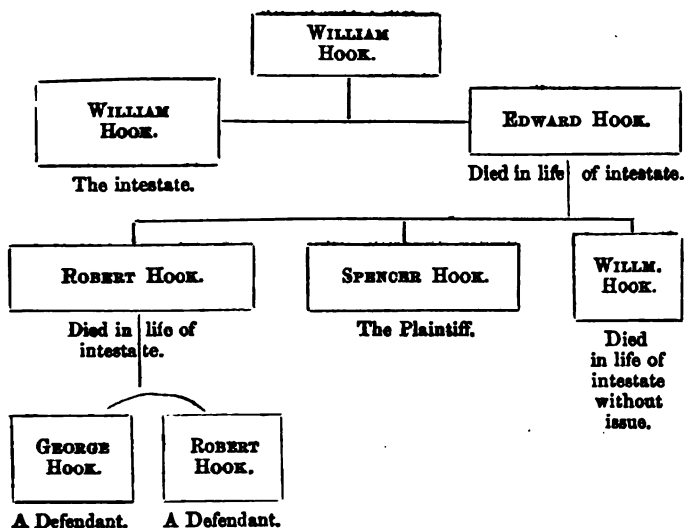
Now, I confess, that upon that language I feel compelled to hold that the trust for the daughters is for their lives only. The appointment is made in this form: The trustees are first directed to stand possessed of the fund "upon the trusts following, that is to say, upon trust," then follow the trusts I have read. The reference to the trusts following must be considered to take in all the trusts, following as they do in one connected series. It is impossible to stop after the first part, which, if it stood alone, would no doubt confer absolute interests on the daughters; but you must take the reference to be to the whole system of trusts, including the restriction of the daughters' interests to life estates, and the gifts over to their children. This is not the case of a good appointment being made, and then followed by an attempt to engraft an invalid restriction upon it. There can be no doubt that the gifts over are void, because they extend to issue generally, and are not confined to issue born within the lifetime of the survivor of the appointors. The result is, that each daughter took a life-interest in one-fifth for her separate use, and subject to that the fund goes as upon default of appointment.

With respect to the question of hotchpot, it is clear that a life interest may come into hotchpot as well as any other. The power of appointment includes the power to appoint life interests, and though it was urged that it could not have been intended that the hotchpot clause should extend to life interests, it is impossible to accede to that argument. Each daughter, therefore, taking her life interest, must bring her share into hotchpot, and the life interest must be valued for this purpose.

HOOK v. HOOK.

THIS was a suit for the administration of the estate of *William Hook*, who died intestate as to certain gavelkind property: the only question being, who was the heir in gavelkind.

The pedigree was as follows:—



The Plaintiff claimed the entirety of the lands as a brother's son of the intestate. The Defendants claimed a moiety as representatives of *Robert*.

Mr. J. N. Higgins, for the Plaintiff.—The question is, whether, according to the custom of gavelkind, there is any representation beyond a brother's children. A precisely similar point arose in *Gooding v. Gooding*, which is mentioned in *Chitty on Descent*, 183, where the matter is discussed at some length; but the case was eventually compromised, and the point has never been actually decided.

In that case *Mr. Peckham* and *Mr. Butler* gave

1862.

Nov. 22nd.

Gavelkind—Jus Representationis.

In customary descent the ordinary incidents of descent attach to the custom. Therefore, in gavelkind descent, the *jus representationis* applies to the remoter issue as well as to the sons of the intestate's brothers.

An intestate had one brother, who died in his lifetime. The brother (besides a son who died without issue in the intestate's lifetime) had two sons; the elder, who died in the intestate's life, leaving two sons (the Defendants), and the younger (the Plaintiff) who survived the intestate:—

Held, that gavelkind lands of the intestate descended, as to one moiety, to the brother's younger son, and as to the other, to the two sons of the brother's eldest son equally.

Argument.

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opinions on one side, Mr. *Preston* on the other ; but the proposition, that all the issue of brothers are entitled to stand in the place of their ancestors, is not supported by the cases cited, which only go as far as the children of brothers: *Co. Litt. (a)*, *Beviston v. Hussey (b)*, *Denn v. Purvis (c)*, *Crump v. Norwood (d)*, *Robinson on Gavelkind (e)*. In all cases of customs differing from the Common Law, the custom must not be extended beyond the established precedents : *Ratcliffe v. Chaplin (f)*, *Denn v. Spray (g)*, 1 Rolle's Ab. *(h)*, *Clements v. Scudamore (i)*, *Blackborough v. Davis (j)*.

The ancient law, as to real and personal estate, was the same ; and it was not till temp. *Henry 1*, that females were excluded from socage lands, and not till the reign of *Henry 2*, that these lands became descendible to the eldest son exclusively.

It was not till even later that the right of representation was established. It was for a long time considered, that, when the eldest son died in his father's lifetime, his younger brother, and not his son (grandson of the tenant in possession) would succeed, unless the elder brother had actually been admitted by the lord to homage ; and the prevalence of this opinion is shewn by the succession of King *John* in the life of Prince *Arthur*, and of the claim of the *Bruces* to the crown of *Scotland*. It was not till the reign of *Henry 3*, that the unlimited right of representation at Common Law was established ; and so far as the authorities go, it has never been established beyond brother's children in the custom of gavelkind. The Statute of Distributions *(k)*, which expressly excludes brother's grandchildren, seems the fitting analogy to this case, as being a remnant of the

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| (a) 140. b. | (f) 4 Leon. 242. |
| (b) Skinner, 385. | (g) 1 T. R. 467. |
| (c) 1 Burr. 326. | (h) 624. |
| (d) 7 Taunt. 362. | (i) 1 P. Wms. 63. |
| (e) Ed. 1858, bk. 1, ch. 6, pp. 57, 58. | (j) 1 P. Wms. 41. |
| | (k) 22 & 23 Car. 2, c. 10. |

old law which once prevailed over the whole kingdom both as to realty and personalty: *Bowers v. Littlewood* (a), and which originally put males and females on the same footing (b). This is shewn by the ordinance of *Edward 1*, confirming the partibility of *Welsh* lands among males. -

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Mr. *Osborne* for the Defendants.—The Plaintiff's contention is wholly unsupported by authority. The conflict between the eminent counsel whose opinions are cited in *Gooding v. Gooding*, did not touch the point raised in this case. In fact, the precise question did not arise there, but the point was as to collaterals more remote than the issue of brothers. All the opinions assume, that, to the extent required here, that is, to the most remote issue of brothers, the right of representation extends in gavelkind as in Common Law tenure.

Preston says, that the right extends through all branches. *Peckham* denies this, but admits that it extends to all descendants of brothers. *Bulter* admits brothers and their issue, though he would exclude the issue of uncles, to which he evidently refers in speaking of the "remoter branches in the collateral line." There is, therefore, no conflict at all as to the point in controversy here.

It is not disputed, that a son and a grandson may take together, or a brother with a nephew the son of another brother. Why is not the same rule applicable to a nephew and a great nephew?

Unlimited representation is admitted in the direct line, and this is so both in gavelkind and Borough English: *Locke v. Coleman* (c), *Clements v. Scudamore* (d). Why should it not also be admitted in the case of collaterals? If you allow representation at all, you have no authority for stopping at the children and excluding the remoter issue of

(a) 1 P. Wms. 593.
 (b) 2 Bl. Com. 516.

(c) 1 My. & Cr. 423.
 (d) 1 P. Wms. 41.

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brothers. *Robinson* on Gavelkind was cited, but the last edition is in great part the work of a subsequent editor, and omits much of the original work. The edition of 1822 contains a note, at page 116, of the case of *Gooding v. Gooding*, mentioning *Cole v. Wade* and another case, which are direct authorities that the jus representationis applies to all branches of collaterals. The real principle is this, that in gavelkind lands you put the customary heir in place of the Common Law heir, and, subject to that, all the rules of descent are the same.

Moreover, if the contention is right, that the custom does not extend to the Defendants, the result is, that the Common Law heir, *George Hook*, must take the whole, and the Plaintiff will be entitled to nothing at all.

Mr. Higgins, in reply.—There is no authority at all for carrying representation beyond the children of brothers, except the two *Nisi Prius* cases mentioned in the note to *Robinson*; and they go too far, if the opinions of *Peckham* and *Butler* have any weight. Whatever dicta there are, rest merely on the loose use of the word issue, in *Butler's* opinion. It is clear, however, from the cases he cites, that he meant only children, for these authorities carry him no further. *Rolle's Abridgment*, too, is clear in excluding transversal lines.

In every case of custom in derogation of Common Law, the custom must be strictly proved: *Muggleton v. Barnett* (a); the onus, therefore, is on the other side. It is to be noticed, too, that representation in gavelkind would lead to infinite confusion, which the Common Law rule of primogeniture excludes; the same sort of difficulty, in fact, which it was at one time feared that the Descent Act had introduced in the case of coparceners.

(a) 26 L. J. Ex. 47.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case has been very ably argued on both sides ; and if I had been compelled, as at first sight appeared to be necessary, to balance conflicting opinions of such eminent conveyancers as *Butler* and *Preston*, I should probably have taken time for consideration. But, on examination, all the opinions referred to appear to agree to this extent, that the right of representation extends to all the issue of a brother. The case stands thus : The canon of descent applicable to the point is laid down in *Clements v. Scudamore* (a), which was a case on borough English lands, where Chief Justice *Holt* said, " The custom alters the descent by the common law to the eldest son, and carries it to the youngest son generally, and must have all the consequences of a descent." Accordingly, the right of representation was admitted as a general incident of descent to operate upon the customary rule of preferring the younger son, exactly as it operated on the common law rule of preferring the eldest. The same principle must be applied, whether the custom be that of gavelkind or borough English. You must first ascertain what the custom is, and then apply all the rules of descent to the custom so ascertained.

In the opinions referred to in *Gooding v. Gooding*, it seems that Mr. *Peckham* at first advised, per incuriam, that the custom did not extend beyond sons and daughters of the intestate. After discussion he abandoned that view, and in his last opinion he says, " In none of the books treating of or referring to gavelkind can I find any authority to support the idea that the custom of gavelkind extends through all the branches of inheritance," the case before him being a claim by cousins of the intestate, tracing their descent through uncles. Then he refers to "*Lambard's Perambulations of Kent*," where he says, sons only

(a) 1 P. Wms. 69.

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" Hook.
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are spoken of; and mentions that Lord *Coke* says that this is the general custom, and adds, "But yet by custom, where one brother dieth without issue, all the other brethren may inherit." So far, therefore, it is not disputed, and indeed it may be treated as clearly established, that the custom extends to divide the land equally among all the brothers of an intestate. Now, that being the custom, you have to apply to it the general rule of descent; and that tells you, that when you have to trace the descent through the brothers of the intestate as stirpes, those who may have died in the lifetime of the intestate must be represented ad infinitum by their issue. The real point which was in controversy in *Gooding v. Gooding* was, whether the custom extended to the descendants of uncles of the intestate as well as to brothers; and it was this which raised the difficulty felt by Mr. *Butler* and Mr. *Peckham*. It was only upon that question that they differed from Mr. *Preston*. What Mr. *Peckham* says upon it is this, "In *Somner, Taylor, Robinson, Comyn's Digest, Watkins on Descent*, and other books adverting to gavelkind, none of the cases stated in exemplifying the custom in the transversal or collateral lines go beyond brothers, and the representatives of deceased brothers taking jure representationis." Now this is the very case before me. I have the son and the grandsons of a brother; and even if Mr. *Peckham's* view is correct as to collaterals, the Plaintiff and the Defendants here would all take by virtue of the jure representationis. Mr. *Butler's* opinion is this, "If this case should be made a subject of judicial inquiry, it would be left to a jury to determine by precedents whether the customary descent of gavelkind stops with brothers (and, where a brother is dead, with his issue), or extends to remoter branches in a collateral line." Mr. *Butler* therefore expresses no doubt that the custom extends to brothers, and (if they are dead) to their issue; and he was much too correct in the use of language to have spoken of issue if he really meant only children. The sole

doubt in his mind evidently was, whether the rule extended beyond those limits: both Mr. *Peckham* and Mr. *Butler*, therefore, were in accord with Mr. *Preston* to the extent of the question raised by the facts before me.

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The *Nisi Prius* cases cited in the note to *Robinson* carry the rule still further; but it is not necessary for the decision of this case to say whether they are right in so doing. The authorities and the opinions cited all go to this extent, that the issue of brothers are included in the custom. And observe what the consequences would be if this were not so. In this very case the Plaintiff claims through a brother of the intestate, and, not being the eldest son, he must invoke the custom to establish his title to a share. The Defendants are the sons of the eldest son of the same brother, and they may fairly ask, "How is it that you oust our superior common law right by the custom, and then claim to exclude us from a share, by saying that the custom does not extend to us?" That would be contrary to all the ordinary incidents of descent, which, according to *Clements v. Scudamore*, are to be imported and applied to the custom; and it is a view which does not appear to have been entertained by any of the three conveyancers whose opinions were taken in *Gooding v. Gooding*. They all agree that the issue of a deceased brother stand in his place for the purposes of heirship.

A very ingenious argument was founded on the supposed origin of the custom of gavelkind, and on the conjecture that the Statute of Distributions was derived from the same general right, which it is suggested originally put males and females on the same footing as to realty as well as personalty. But if that were made out, and I were to hold on that ground that the grandchildren were not to share with the children of a brother under the custom, because they do not share under the statute, I must, in order to be consistent, say also, that if all the brothers

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are exhausted, leaving a number of nephews, the children of different brothers, they must take per capita and not per stirpes; which would certainly be contrary to the course of descent established by *Clements v. Scudamore*, that, when once the custom is ascertained, the ordinary incidents of heirship are to be applied to it. The analogy in any case would be a very strained one; and even if admitted, it would still leave marked differences between the custom of gavel-kind and the distribution of personal estate. But in truth there is no analogy between the two cases; and I think there is no reasonable doubt that the property goes as to one moiety to the Plaintiff, and as to the other to the Defendants *George* and *Robert Hook* equally. There will be a declaration to this effect, and a decree to carry the trusts of the will into execution. The costs to come out of the residuary personal estate.

2 Dec. 1. 1863.

1863.

April 24th,
 25th, & 27th.

Where a bill alleges a judgment obtained by fraud, and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or in default to have the compromise carried out, and the Court is of opinion that the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed.

CAWLEY v. POOLE.

THIS was a Bill seeking to set aside a judgment, or, in default, to have a compromise carried into effect.

The Plaintiff was a lieutenant in the Royal Navy; all the Defendants were solicitors: the Defendant *Were* carrying on business at *Plymouth*, the others in *London*.

The Bill stated, that, in and after the year 1835, the Plaintiff, then a mate in the Royal Navy, employed the Defendant *Kincaid* as his solicitor; that, in the year 1837, the Plaintiff was staying at *Plymouth*, and that *Kincaid* came down there, and invited the Plaintiff to dine with him at his lodgings to meet the Defendant *Were*; and that *Kincaid* then asked the Plaintiff if he was in want of money;

and in the course of the evening proposed to him that he should accept a bill of exchange for £120 or £130, and that he (*Kincaid*) should take it to *London* and have it discounted, and that they should divide the proceeds, and should provide between them for taking up the bill at maturity. It then stated, that *Kincaid* drew and the Plaintiff accepted a bill in accordance with this arrangement in the presence of *Were*, who was cognisant of the whole transaction ; and that *Kincaid* then took away the bill with him ; that the Plaintiff never received any part of the proceeds of the bill, and never heard anything more of it till April, 1838, when he was served with a writ at the suit of *Were* in an action on the bill ; that the Plaintiff entrusted his defence to a person named *Pound*, whom he understood to be an attorney, with instructions to defend the said action, and that he was informed that the same would come on for trial at *Westminster* "on a particular day ;" that he accordingly attended on that day, and was then informed, that, before his arrival, the case had been disposed of, and a verdict taken against him ; and that at two o'clock on the same day he found execution had been issued for the debt and taxed costs, and that the Sheriff's officers were in his house.

The Bill then contained the following statement :—"The Plaintiff is advised and believes, that according to the practice of the Courts of Common Law execution could not at earliest have been issued till three days after the judgment had been obtained ; and from that and other circumstances the Plaintiff believes that the said Mr. *Pound* had been tampered with, and did not really defend the said action, and that in fact no defence was ever entered thereto."

It appeared from the record that the Plaintiff had been in fact represented by a person named *Williams* in this action.

The Bill then stated that the Plaintiff evaded the sheriff's

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officers and went to the Continent ; and that he heard no more of the matter till the year 1855, when he was served with a notice to revive the said judgment ; and that he was then advised that he could not successfully resist such revival. It then alleged that nothing was done under the revived judgment till the year 1860, when a freehold house at *Plymouth* belonging to the Plaintiff was extended under an elegit.

The 7th paragraph was as follows :—" In the month of May, 1860, the Plaintiff saw the Defendant *Nicholas Were* at *Plymouth* ; and finding that the aforesaid elegit impeded his enjoyment of his aforesaid property, the Plaintiff proposed to the Defendant *Nicholas Were*, for the sake of peace, and in order to emancipate his said property, to compromise the aforesaid judgment : and at length it was agreed between the Plaintiff and the same Defendant that the Plaintiff should give the said *Nicholas Were* the sum of £50 in full of all claims. The Plaintiff was willing to have settled the matter upon these terms, but the said *Nicholas Were* said that before concluding the arrangement he must consult the Defendant *C. H. Kincaid*, but that he the said *N. Were* was willing to accept this sum of £50 in full satisfaction of his aforesaid judgment. The Plaintiff has since discovered that the Defendant *N. Were* took from the Defendant *C. H. Kincaid* some collateral security for the amount of the said bill of exchange, of the particulars of which security the Plaintiff is ignorant."

The remaining material statements of the Bill were to the following effect :—

After the transaction about the bill, *Kincaid* was taken into partnership with the Defendants *Poole* and *Johnson* ; and the firm of *Poole, Johnson, & Kincaid*, so long as the partnership subsisted, and *Poole & Johnson* since its

dissolution, down to the present time, acted as the *London* agents of the Defendant *Were*.

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Early in 1861 the Plaintiff employed *Poole, Johnson, & Kincaid* to bring an action for him against one *Lidstone* for arrears of rent and mesne profits; and it was agreed between the Plaintiff and *Kincaid*, that *Kincaid* should concur in the agreement between the Plaintiff and *Were*, and should pay *Were* the sum of £50 in discharge of the judgment; and that such sum of £50 should be retained by *Poole, Johnson, & Kincaid* out of the proceeds of the action, and be paid by them to *Were*.

On this occasion the following letters passed:—

“ 4, *Fitzroy Street, Fitzroy Square*,
“ January 26, 1861.

“ Dear Sir,—Having ejected one *Lidstone* of *Plymouth*
“ from a freehold of mine in March 1860, and upon which
“ freehold Mr. *N. Were* of *Plymouth* has fixed an elegit,
“ arising out of a judgment upon a bill of exchange some
“ twenty years past, such bill being drawn by you, accepted
“ by me, and indorsed over to Mr. *N. Were*, it being my
“ purpose to place an action in your hands for the recovery
“ of eight years’ arrears of rent, more or less, beside other
“ demands from the before-mentioned *Lidstone*, I think
“ the simple understanding between us to be this, viz.—
“ That you will bring the said action for a sum which shall
“ be agreed upon between us, and without looking to me
“ for any costs between attorney and client, or in any other
“ way; and any sum you may recover over and above
“ £50 shall be paid to me without deduction. And the
“ said £50, which you shall retain, shall be a full discharge
“ of all claims upon me on account of the said bill, which
“ bill shall be given up into my possession, and the judg-
“ ment and elegit now levied on my freehold, viz. No. 6,

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" *Salem Street, Plymouth*, by Mr. *N. Were* shall be transferred and given over to me without cost or other charge, so as to leave the above-recited freehold entirely disincumbered by Mr. *N. Were*, whose authority and concurrence you are fully invested with to conclude such an agreement.

" Yours very truly,

"To *C. H. Kincaid*, Esq.

"JNO. CAWLEY."

"Firm of *Poole, Johnson, & Kincaid*.

" *New Square, Lincoln's Inn*,

" 15th April, 1861.

" Dear Sir,—From my long knowledge of you, and your circumstances as a half-pay lieutenant in the Navy, at your request I consent to settle your affair with Mr. *Lidstone* for mesne profits for costs out of pocket only, provided the action come to trial; and to retain £50 only from any amount paid into Court or received in the said action in consideration of Mr. *Were's* judgment against you, in case he consent to release you thereon and the elegit on your property.

" Yours, very truly,

" CHARLES H. KINCAID.

" *John Cawley*, Esq., R.N."

In May, 1861, *Lidstone* paid £172 into Court in the said action; and such sum was taken out by *Poole, Johnson, & Kincaid*, who paid the Plaintiff £67, and retained the balance (£105) in their hands. In the month of November, 1861 (after the dissolution of partnership with *Kincaid*), the Plaintiff took out a summons against *Poole & Johnson*, to shew cause why they should not pay over the said sum of £105 to the Plaintiff. In defence to the said summons, *Poole & Johnson* urged,—first, that the agreement in reference to the action was a matter personal

to *Kincaid*, for which they were not responsible, and that *Kincaid* had received all the money; and, secondly, that they were assignees of *Were's* judgment, and that a sum exceeding £105 was due to them at foot thereof.

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On the 11th of November, 1861, *Poole & Johnson* caused themselves to be served with a garnishee order in *Were's* name, attaching the balance of £105 in their hands.

The Plaintiff charged that *Were* had not discounted the bill, but had received the same after maturity, and that he knew that *Kincaid* was liable for one half of the amount; and he particularly claimed that the Defendants ought to be decreed to do all necessary acts and things for entering satisfaction upon the said judgment, and for discharging the said *elegit* without any payment whatever. But in case the Court should be of opinion that the Plaintiff was bound by his offer, made only to purchase peace, to pay the sum of £50 in respect thereof, then he claimed that *Poole & Johnson* ought to be decreed to pay him the balance of the £105, with interest from the 8th of May, 1861, after deducting the said sum of £50, and ought in the meantime to be restrained from prosecuting the aforesaid judgment.

The Defendant *Were*, by his answer, stated that he had no recollection whatever of the alleged dinner transaction at *Plymouth*; that, on or about the 17th of September, 1837, he, at *Kincaid's* request, discounted a bill dated the previous day, drawn by *Kincaid*, and accepted by the Plaintiff; that the bill was dishonoured at maturity; that he thereupon sued the Plaintiff, who pleaded non *assumpsit*, and no other plea; that, on the 9th day of June, 1838, judgment was recovered in the action for £117 : 7 : 11 debt, and £45 : 18 : 7 costs; that he immediately issued execution, but without effect; and that he heard no more of the Plaintiff till 1855, when he revived

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the judgment, as stated in the Bill. He then stated that *Kincaid* had left *England* in 1838, and that he (*Were*) had been unable to find him till 1851, when the debt had been barred by the Statute of Limitations.

Then, after admitting the issue of the *elegit*, he said that the Plaintiff had called on him, and suggested a settlement, and offered £50, which he had refused ; that he had offered to release the Plaintiff on payment of half what was due for principal, interest, and costs, but that nothing was done upon such offer.

The Answer then formally traversed the 7th paragraph of the Bill, except as to the fact of his meeting the Plaintiff at *Plymouth* at that time ; and the Defendant professed ignorance of all the transactions respecting the action against *Lidstone*. And in reference to the garnishee order, he said that there had been no assignment of the judgment, but that he had informed *Poole & Johnson*, that, if they could get payment of the judgment, they might retain the amount on account of his debt to them as his *London* agents ; and he admitted that he, through *Poole & Johnson* as his agents, had served the garnishee order on *Poole & Johnson*. The Answer then again denied the existence of any agreement between the Plaintiff and this Defendant, and, in proof that there was no such agreement, set forth the following letters :—

“ 9, *New Square, Lincoln's Inn*,
 “ 26th June, 1861.

“ *Cawley*.

“ My dear *Were*,—Enclosed you have a letter from
 “ *Cawley* to me, and the duplicate of an arrangement
 “ I have entered into with him, *subject to your ap-*
 “ *proval*, and considering the trouble I had with him
 “ twenty-five years ago, and my heavy bill of costs, I
 “ consented to it most unwillingly, and should have declined

"it altogether but for his very urgent appeal to our old acquaintance, and his narrow circumstances. The result of the arrangement will therefore be, that *Cawley* will pay £50 only, and I shall be liable to you for the balance; and as you were so kind as to say that on *Garrard* being settled with I should have the money in your hands belonging to poor *Dunnage's* estate, there will be ample to meet this liability, and to pay yourself the advances so kindly made to keep up the premiums on my policy. The inclosed letter from *Cawley* to me will shew you what he wants you to do in the matter.

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"Did my mother pay you £50 in respect of the bill? I fancy I have a sort of indistinct recollection, that, when I was staying with you in *Southside-street*, on my return from *France*, you told me she had.

"Yours very truly,

"CHARLES HENRY KINCAID.

"*Nicholas Were*, Esqr."

The inclosure was the following:—

"4, *Fitzroy Street*, *Fitzroy Square*, *W.C.*

"June 24th, 1861.

"Dear *Kincaid*,—Will you be so good as to get the necessary memorandum from *Were* accepting the £50 as satisfaction of his elegit upon the house in *Salem-street*, and his willingness to transfer his judgment in aid of my title to the property, as I want to make arrangements for mortgaging or selling the property forthwith.

"Believe me, yours very truly,

"*C. H. Kincaid*, Esq."

"JNO. CAWLEY.

The duplicate arrangement, mentioned in *Kincaid's* letter of 26th June, was a copy of the letter of the 26th January, set out in the Bill.

The Defendant swore that he had kept no copy of his

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answer to that letter; but that he knew that that answer stated that he wanted £100 for the judgment, and that no money had been paid him by *Kincaid's* mother.

To the missing letter *Kincaid* sent the following reply :

"9, New Square, Lincoln's Inn,

" 10th July, 1861.

" *Cawley*.

" My dear *Were*,—I should have written you sooner as to this, but I have only just been able to see *Cawley*. " There is no doubt he ought to pay the £100, but he is " not disposed to increase his offer of £50, which, for the " sake of peace and quietness, I have agreed, as far as I am " concerned, to accept, and take the balance of your claim " on my shoulders. However, I shall get something out of " the action against *Lidstone* for mesne profits, which will " be tried at *Exeter* on the 25th.

" Yours sincerely,

" *N. Were*, Esq."

" CHARLES H. KINCAID.

To this letter was sent the following answer :—

" *Plymouth*,

" 11th July, 1861.

" *Cawley*.

" My dear *Kincaid*,—At the time I sign the release of " the debt and the transfer of the judgment to *Cawley*, he " must pay the costs *incident to the transfer* and the £50.

" Yours sincerely,

" N. WERE.

" *C. H. Kincaid*, Esq., 9, New Square."

The Answer then stated that nothing had been done upon this letter; and that, save as therein appeared, *Poole Johnson, & Kincaid*, had not nor had any of the partners in the said firm as the solicitors or solicitor of the Plaintiff any written communications with *Were* on the

subject of the agreement ; and submitted that there was no agreement binding on him.

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The following was the only other letter set out :—

“ *Plymouth*,
“ 21st August, 1861.

“ *Cawley*.

“ My dear Sir,—I have looked up my correspondence with
“ *Kincaid* upon this matter. *Cawley* called upon me last
“ year, and offered me £50 in full for my debt, which I
“ refused. When in *London in June last*, *Kincaid* asked
“ me to name the sum I would take, and he *Kincaid*
“ offered to hold himself liable to me for the balance of the
“ debt. I then fixed £100 ; but *Kincaid* on the 26th June
“ inclosed me a letter from *Cawley* to him of the 24th
“ June, by which it appears *Kincaid* agreed on my behalf
“ to take £50 in discharge of my claim, he *Kincaid*
“ holding himself liable to me for the balance. In reply
“ to *Kincaid's* letter, I wrote him on the 11th July as
“ follows :—

“ ‘ *Cawley*.

“ ‘ At the time I sign the release of the debt and transfer
“ ‘ of the judgment to *Cawley*, he must pay me the costs
“ ‘ incident to the transfer and the £50.’

“ You see how the matter stands, and if *Cawley* wants me
“ now to compromise, it appears to me he must propose
“ terms de novo. I should not be at all surprised to see
“ *Cawley* here, but I do not intend to make any agreement
“ with him, and shall refer him to you.

“ I send you a letter marked A, without a date, which
“ may be of use for you to see, but please return a copy to
“ me, and the two other originals of the 24th and 26th
“ June.

“ I am, dear Sir, yours very truly,

“ N. WERE.

“ *H. D. Poole, Esq.*”

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The Answer of the Defendants *Poole* and *Johnson* was to the same effect.

Kincaid was out of the jurisdiction, and did not appear.

The only material evidence not appearing on the pleadings consisted of the following letters :—

“ 39, *Upper Charlotte Street*,

“ August 6th, 1861.

“ Dear *Kincaid*—Receiving no reply to my letter of the “ 25th ultimo, I called at your office, and again to-day. I “ suppose your business in *Paris* has occupied you so much “ that you forget me, but it has put me to great inconvenience, as I was to be in *Devon* on the 7th. It was in “ June I first wrote you on the subject, which now simply “ revolves itself into this.—The release from *Were* and £50, “ or no release and £105.—When will you be at liberty to “ see me on the point? Hoping you are well, believe me, “ in haste,

“ Yours very truly,

“ *C. H. Kincaid, Esq.*”

“ JNO. CAWLEY.

“ 9, *Lincoln's Inn*,

“ 19th August, 1861.

“ Dear Captain,—I have heard from Mr. *Were*, and I “ think there will be no difficulty in arranging the sale of “ the house. Perhaps, when you are passing, you will give “ me a look in on the subject.

“ Yours very truly,

“ Captain *Cawley*.”

“ H. D. POOLE.

It also appeared, that, on the occasion of suing out the *elegit*, *Were* had given a false account of the origin of the debt, which, though challenged so to do, he had not in any manner attempted to explain.

Mr. *Cottrell* and Mr. *Massey Dawson*, for the Plaintiff, now urged that the Plaintiff had been reluctantly compelled to come into this Court from the technical rule of law, that accord and satisfaction could not be pleaded to a judgment; nor could the payment of a smaller sum be pleaded in bar of an action for a larger, unless there were some collateral advantage given; 1 *Smith, L. C. (a)*, *Selwyn's N. P. (b)*, *Re Corporation of Drogheda (c)*. If, however, *Kincaid* had been exonerated by the Statute of Limitations (and this was *Were's* case), then his undertaking was an advantage to *Were* sufficient to support the compromise, but for the judgment: therefore, there was a complete case for equitable interference. They argued that *Were's* letter of the 21st August was not written till long after its date; but that at any rate it disclosed the existence of a correspondence between *Were* and *Poole*, which had been denied by the Answer.

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Mr. *Southgate*, Q. C., and Mr. *Babington*, for the Defendants:—

There never was any concluded agreement. Even if there had been such, the Plaintiff, by taking out a summons for the payment of the whole £105, disaffirmed the same and cannot now set it up against us; but in fact nothing was done since the letter in which *Were* says the Plaintiff must propose terms de novo: *Holland v. Eyre (d)*. Moreover, the agreement is not enforceable, *Kincaid* has since absconded, and the parties cannot now be placed in the same position as they were.

At any rate, this Bill, by seeking to set aside the whole transaction, has precluded the Plaintiff from praying specific performance of the agreement: *Lindsay v. Lynch (e)*.

(a) Pag. 295.

(d) 2 S. & S. 194.

(b) Pag. 137.

(e) 2 Sc. & L. 1.

(c) 8 Ir. C. L. 19.

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Mr. Cottrell in reply :—

The object of the Bill is to carry into effect an agreement for the compromise of matters in bona fide litigation. *Kincaid* was throughout *Were's* agent, and we may treat everything which took place with him as if *Were* had himself been present.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD.

This case has been very well argued ; it is one of an extremely singular character : and though I think the first part of the Bill open to very serious objections, still I cannot deny that the Plaintiff has evidently been treated with very considerable harshness.

The Plaintiff fails, not because he has not a case which might have succeeded on the merits, but because he has not chosen to frame his case duly. Had he been contented to rest solely on the agreement, and not attempted to get rid of the original judgment, he might have succeeded. The judgment was recovered so long ago as 1838, and after submitting to it without question till 1862, he now attempts to get rid of it in a very singular fashion. [His Honour here read the account given in the Bill of the manner in which the judgment had been obtained ; see ante, page 50].

Even on this narrative the Plaintiff gave *Kincaid* sufficient power to deal with the bill of exchange as he pleased ; and his real ground of complaint is against *Kincaid*, for not giving him his share of the proceeds of the bill ; but that does not affect these Defendants. Then comes the judgment, which places him in this difficult position, that, in order to escape from it, the whole onus of making a case lies upon him ; but his only attempt to invalidate the judgment is this : [His Honour read the passages in the Bill

relating to the recovery of the judgment, see ante, page 57].

Then it is said, the judgment was irregular by reason of these circumstances ; and an able argument was addressed to me by Mr. *Dawson*, to the effect that I was to assume that the judgment was to be treated as fraudulent and void. But there is an obvious answer to this : If there be irregularities in the proceedings, the Plaintiff has or had a remedy at law ; but such irregularities cannot afford sufficient ground for coming into this Court. I find no attempt to deal with *Pound* or *Williams*, and not even a distinct allegation in the Bill, still less anything like proof, that there was any collusion in the matter ; so that this seems to me to be a perfectly hopeless contention.

The second part of the case is, however, substantiated to such an extent that there would have been, I think, a good case for the Plaintiff had he confined himself to that. [His Honour then read the 7th paragraph of the Bill, as hereinbefore stated, and continued :] There is a material alteration in the affidavit, which contains this passage, ‘ I was willing to have settled the matter upon these terms, but the said *Nicholas Were*, when I saw him a few days afterwards at his own house, said that he thought he ought to have more.’ (*Were* himself states that he said he should have £100,) ‘ but that, before concluding the arrangement, he must consult *Kincaid*.’ There is therefore no concluded arrangement yet. Then *Kincaid*, who seems to have recovered from his difficulties, enters into partnership with *Poole* and *Johnson*, and it appears that the firm of *Poole, Johnson, & Kincaid* were *Were*’s London agents ; that of course would not authorise them to conclude an agreement of this sort.

Then we have the following transaction :—*Kincaid* had been employed by the Plaintiff to bring an action against *Lidstone* for mesne profits, which would bring

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moneys into his hands on behalf of the Plaintiff; and in that state of things the Plaintiff writes this letter [His Honour read the letter of January 26, 1861;] which assumes throughout that *Kincaid* had authority to act for *Were*. In answer to this letter, *Kincaid* wrote the letter of April 15, 1861: [His Honour read it.] Here you have no definite agreement yet, but you get a long way towards it; *Kincaid* agrees so far as he has any interest, but he was up to that time *Cawley's* agent only. So far the matter is a proceeding between *Cawley* and *Kincaid*; then it hangs over till June, when *Kincaid* writes to *Were* the letter of the 26th June set out in *Were's* Answer, inclosing *Cawley's* letter of June 24, and a copy of his (*Kincaid's*) own letter to *Cawley* of April 15. I may remark that *Kincaid*, in writing to *Were*, says, "*Cawley* will pay," not "I will apply;" so that there is nothing here even proposing to constitute *Kincaid* *Were's* agent to receive the money.

Were does not come into the arrangement at all; but he writes some letter, of which he says no copy was kept. That has been made the subject of much comment; but I do not think that it is matter for comment adversely to *Were*; it is pretty plain from *Kincaid's* reply what the tenor of it was. That reply is as follows: [His Honour read the letter of 10th July, 1861:] and then *Were* answers, coming in in a certain way to the terms; but he says "he must pay the costs incident to the transfer, and the £50." Now, when I look at the manner in which *Were* himself speaks of this transaction in the letter to *Poole* of August 21, 1861, "*Kincaid* agreed on my behalf to take £50 in discharge of my claim;" I should have been strongly disposed to hold that there was a concluded agreement on the part of *Were* to take £50 and release the Plaintiff; and I do not think that the fact, that the letter of July 11 was not answered, would open the agreement in

any way, because I think, that, on the face of the whole correspondence, the Plaintiff would have had to pay the costs without any express agreement.

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What did in fact take place was this :—*Kincaid*, for some reason of his own, never communicated one word of all this to the Plaintiff; and we find him (the Plaintiff) in the letter of August 6, 1861, complaining of this silence; and this letter shows that he was then in ignorance of any concluded agreement, for he treats the matter as open: he says, in effect, to *Kincaid*, you have £105 of mine in your hands, either pay me £55, and get me *Were's* release, or pay me £105 without the release.

But though I think there was an agreement by *Were* to take £50, I do not see any authority to *Kincaid* to receive the money for him. Mr. *Massey Dawson* says, it is a case of accord and satisfaction, and that payment to the attorney is sufficient—I did not hear Mr. *Southgate* on that—No doubt, *Kincaid* had the money, and *Cawley* had made him his agent to retain the £50, and pay it over to *Were*, but what evidence is there of an assent to this by *Were*? Authority to conclude an agreement does not involve authority to receive the money; and *Were*, in his letter of the 11th July, says “when I sign the transfer *Cawley* is to pay,” i.e., to me. Still, on the whole evidence I should have been inclined to hold that there was a concluded and binding agreement to accept £50 in discharge of this claim, if the bill had been originally, or were by amendment, so framed as to render it necessary to decide the question.

But upon this bill, I think I cannot give any relief on the footing of such an agreement. The Plaintiff files his Bill to set aside the whole transaction, and then he says, “I offered, for the sake of peace, to make this arrangement.” And then he prays, first, that the whole matter

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may be unravelled from the commencement; "That the Defendants may be decreed to do all such acts and deeds as shall be necessary for entering up satisfaction on the aforesaid judgment, and for removing the elegit upon the Plaintiff's property, without the payment to them by the Plaintiff of any money whatever;" and, in the second place, and only "if the Court shall be of opinion that the Plaintiff is bound" by the agreement, he asks that the agreement may be performed.

Now, the only consideration that could be suggested for the agreement, must be either: 1st, A compromise of disputed claims in respect of the judgment; or, 2nd, Assuming that the debt was beyond dispute, then the acceptance of *Kincaid's* suretyship to the extent of £50, after the remedy against him on his original liability had been barred by the Statute of Limitations.

But, looking on the matter as a compromise—and this is not perfectly clear as against *Were*, because *Kincaid* does not say anything like this to *Were*—but even assuming that it was a compromise, it cannot be established by such a Bill as this, which is directed to overturning the judgment: a bill in this form, which says, overturn the agreement, or, in the alternative, confirm it, is open to the objection which used to be described as approbating and reprobating the same transaction. All question of compromise has ceased, the Plaintiff has had the matter tried out, and it has been decided, and decided against him.

Then, on the other ground, you have a mixed consideration, and you cannot get rid of a part of the consideration without abandoning the whole. *Kincaid* was, at the time when this agreement was entered into, a solvent man; and if this agreement is to be binding because of the liability which he undertook, this Plaintiff cannot come here, after he has absconded, to affirm it for the first time. The Plaintiff never

adopted the agreement till after bill filed, and not then except in this way—He says: If I cannot get rid of the agreement completely, then I stand upon the agreement. In fact, till he sees the letters in the answer, he does not know what has passed between *Kincaid* and *Were*. I am clear, therefore, that it is now too late for him to rely on the agreement, and that I must dismiss this bill.

There remains only the question of costs, and here I have been put into some difficulty by the conduct of *Poole* and *Johnson*.

The Plaintiff was in this condition: He wanted to settle the judgment, in order to enable him to sell his house; and, accordingly, finding himself entirely in the hands of his solicitors, he made a proposition to them for that purpose. Now, on the 19th August, after *Kincaid* has absconded, *Poole*, as the Plaintiff's solicitor, wrote him this letter. [His Honour read it.] The expression "no difficulty" must mean, no difficulty with reference to your views, i.e., of getting rid of the judgment.

Then there is the denial in their answer that there had been any letters other than those set out, though, from *Were's* letter of August 21, it is plain that there was some correspondence which had not been disclosed.

But it is plain if these gentlemen had done their duty by their client, and the Plaintiff had known all that was in the letter of the 21st August, he might at once have put things in train on the footing of the agreement. I do not agree with Mr. *Dawson*, that the letter is a concocted letter—I think it rather a frank letter; but it does not appear that that letter was communicated to the Plaintiff till the answer was put in in this suit; and it does appear to me, that it was the duty of the solicitors of *Cawley*, who had got letters admitting so much that was

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favourable to their client from *Were* who was not their client, and therefore whose letters were not privileged in any way, to communicate that information at once to their client, and not allow his interests to suffer by his being kept in the dark, still less themselves afterwards to take advantage of his ignorance. If *Poole* had acted properly towards *Cawley*, the matter might have been brought to a termination, and might have resulted in *Were* being bound by the agreement; whereas the next thing they do is, that on being summoned to pay the £105, they shelter themselves under a statement that *Kincaid* had the money; (very likely he had, but that is not material);—they would rather throw the loss on their client than on the partnership: then they take an assignment of the judgment from *Were*,—I say they had much better have let *Were* act for himself;—then having, as they say, *Were* as their debtor, who is a perfectly solvent man, they rake up this debt which they might have settled to their client's advantage, and make use of it to protect themselves against that client's claims.

I think *Cawley* has just grounds of complaint against them; and though there is much to object to in this Bill, I dismiss it without costs.

I do not think I can put *Were* in any better position, considering his conduct, and particularly that he has left unexplained a most extraordinary statement made by him in another Court, and that although he was expressly challenged to explain it.

The Bill will be dismissed without costs as against all the Defendants.

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IN RE THE LAKE BATHURST AUSTRALASIAN
GOLD MINING COMPANY.

THIS was a Bill on behalf of all the Shareholders in the above-mentioned Company, praying in effect for a winding up thereof, and for accounts against the Directors; and particularly praying that an account might be taken of the proceeds of the sales of such of a certain lot of 40,000 shares, mentioned in the Bill to have been obtained by the Defendant *Nathaniel Iron* as the consideration for the purchase of 500 acres of land, as had been sold by the Defendants *Matthews, Knell, Harvey, Iron, Bell, Bevan, Sir Edward Belcher, and Boyle*, respectively, or any of them; and that the said Defendants might be ordered respectively to repay the same to the Company, to be dealt with as part of the assets thereof, and to deliver up the scrip certificates of such of the said shares as then remained in their respective possession or power undisposed of; and particularly that the Defendant *Boyle* might be ordered to account for the proceeds of the sale of such of the 1,750 shares in the Bill stated to have been delivered to him by the Defendant *Iron* as he had sold, and to deliver up such of them as he had not sold.

The material facts relating to the issue of the 40,000 shares in question were the following:—In December, 1851, the Defendants *Matthews* and *Knell* claimed to be entitled to a tract of 500 acres at *Lake Bathurst*; and, by an agreement, dated 8th December, 1851, this tract was agreed to be sold to the Defendants *Bell, Iron, Sir E. Belcher, and Harvey*, for £17,000, to be paid as follows:—£3,000 down in cash or approved securities, and £14,000 on or before 8th March, 1852; and the purchasers agreed forth-

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May 7th.
Joint-Stock
Company—
Shares fraudu-
lently issued—
Bonâ fide
Holder.

Where shares in a Joint-Stock Company have been issued fraudulently, a bonâ fide purchaser of these shares in the market, before any Bill has been filed to impeach the transaction, is entitled, on a winding-up of the Company, notwithstanding the fraud, and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the Company who bought their shares at par: but this privilege does not extend to any person who purchased his shares after the filing of the Bill, unless his vendor was a bonâ fide holder of the shares before Bill filed; and the onus of proof that such was the case is upon him.

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with to use their best endeavours to get up a Company to work the land as a gold mining speculation.

On the execution of the agreement, the purchasers gave the vendors three promissory notes for £1,000 each; and these were deposited with Mr. *Terrell*, the solicitor of the vendors.

The proposed Company was then formed, the promoters being the purchasers and the Defendants *Bagshaw*, *Bevan*, *Denny*, and *Boyle*, and two persons named *Swann* and *Richards*.

It was agreed that Sir *E. Belcher* and *Bell* should be two of the Directors of the Company; and they, therefore (colourably, as the Bill stated), released all their interest in the land to the Defendants, *Harvey* and *Iron*,

By an agreement dated 26th January, 1852, and made between *Harvey* and *Iron*, as owners of the lands, of the one part, and *Swann* and *Richards*, on behalf of themselves and the Directors of the Company, of the other part, *Harvey* and *Iron* agreed to sell the said 500 acres to *Swann* and *Richards* for £40,000, to be paid as follows:—As soon as the shares had been allotted, and £20,000 paid thereon, *Harvey* and *Iron* were to receive £5,000, and they were to have a further sum of £5,000 out of every £10,000 afterwards paid up, until the paid-up capital had reached £50,000, at which time they would have received £20,000 in cash, and the remaining £20,000 was to be paid in £1 shares of the Company. It was further agreed that *Swann* and *Richards* were not to be under any personal liability, but were merely to be treated as agents for the Company. The Company was then brought out as a Cost Book Company, with a capital of £100,000, in £1 shares, not liable to further call; and the first Board of Management were announced to be the Defendants Sir *E. Belcher*, *Bagshaw*, *Bevan*, *Bell*, and *Denny*.

The shares of the Company were made transferable simply by transfer of the scrip certificate.

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On the 22nd July, 1852, the Defendant *Boyle* was substituted for Sir *E. Belcher* as a Director.

By an indenture, dated 25th August, 1852, *Harvey* and *Iron* agreed to accept 40,000 shares of £1 each as the consideration for the land; and scrip certificates for such 40,000 shares were thereupon issued to them.

The Bill then stated that *Harvey* and *Iron* thereupon transferred 12,000 shares to *Matthews* and *Knell*, as part of the consideration for the sale by them; and that *Harvey* retained 2,010 shares himself; and that *Iron* had possessed himself of the remaining 25,990 shares, and had distributed them between himself and the other Defendants in some manner not known to the Plaintiff.

It further stated, that 1,750 paid up shares had been delivered to the Defendant *Boyle* by the Defendants *Harvey*, *Bell*, and *Iron*; and that they had obtained such shares without the payment of any money consideration therefor.

The objects for which the Company had been formed entirely failed, and the Company never commenced operations at all.

Under these circumstances the Bill was filed.

By the decree made at the hearing of the cause, dated 9th August, 1856, it was declared that the agreement of the 26th January, 1852, was not binding on the Company; and that the sale of the 500 acres thereby purported to be made, was fraudulent and void as against the Company; and that the indenture of 25th August, 1852, was similarly void; and that such agreement and indenture respectively ought to be delivered up to be cancelled: and it was declared, that the Defendants *Iron*, *Bell*, and Sir *E. Belcher*, and the estate of

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Harvey, and the Defendant *Boyle* to the extent of 1,750 shares, were jointly and severally liable to make good to the Plaintiff and the other shareholders in the Company the amount, not exceeding £1 per share, which should be established as a demand recoverable against the assets of the Company by the respective holders of any of the 40,000 shares delivered to *Iron* and *Harvey*; and that the Defendants *Bagshaw*, *Bevan*, *Denny*, and *Boyle* were jointly and severally liable to make good so much of the same demand as should not be made good in manner aforesaid : and it was ordered, that an inquiry should be made how the 40,000 shares had been disposed of by *Iron* and *Harvey*; and the usual accounts were ordered against the Directors, and the ordinary winding-up order made.

By the Chief Clerk's certificate, dated the 26th May, 1862, and duly approved, it was found that the 40,000 shares in question were disposed of by *Iron* and *Harvey* as follows :—*Harvey* retained 2,010, and *Iron* retained 37,990. *Harvey* first assigned 2,000 to one *Batters* (who represented that he had sold them for £1,500), and then sold the remaining ten shares. *Iron* had delivered 12,000 shares to the said Mr. *Terrell*, for *Knell* and *Matthews*; and there was no evidence how he had disposed of the remaining 25,990. There were in the hands of the official assignee of *Bagshaw* 1,935 shares, part of the 40,000, and also 25 shares, which were at once further part of the 40,000 and also part of the 700 in respect of which *Denny* had been settled on the list of contributories. The persons named in the schedule were the only persons who had proved claims as holders of any part of the 40,000 shares. The total number of shares mentioned in the schedule amounted to 3,510; the total amount of consideration paid for them to £1,717 : 12 : 6. Of these, 1810 appeared to have been purchased before the filing of the Bill, 1510 after that date, and as to 190 it was not found when they were purchased. The 1510 after-purchased shares were distributed as follows :—

<i>John Thomas Hatred,</i>	190 shares, bought at 5s. 6d.	1863.
<i>Nathaniel Lindo</i>	} 425 " " " 3s. 6d.	BARNARD
(the Plaintiff's Solicitor)		
<i>Samuel Lowndes</i>	500 " " " 2s. 6d.	v. BAGSHAW.
<i>Charles Palmer Phillips</i>	395 " " " 1s. 6d.	
		Statement.

By the order made on further consideration, dated 29th July, 1862, it was, amongst other things, ordered that the Defendants *Iron, Bell, and Belcher*, and the Defendant *Boyle* as to £1,750, should pay to the Plaintiff and the other holders of original shares, such a sum of money as the Chief Clerk should certify to be payable out of the assets of the Company to shareholders holding part of the 40,000 shares; and the official manager was to be at liberty to prove against the estate of *Harvey* for the amount so certified; and in case a full payment were not obtained in manner aforesaid, it was ordered that the Defendants *Bevan, Denny,* and *Boyle* should make good the deficiency; and it was ordered that the cash in the hands of the official manager should, after payment of certain costs, be apportioned amongst the holders of original shares and such of the bona fide holders of any of the 40,000 shares as should have established, or before the apportionment should establish, a claim to be entitled to participate in the funds of the Company; and an inquiry was ordered, which of the claimants in respect of any of the 40,000 were holders for value of their shares before the filing of the Bill, or now held shares by title derived from such last-mentioned holders of shares; and an inquiry under what circumstances *Nathaniel Lindo*, the solicitor of the Plaintiff, acquired such shares as appeared to have been purchased by him after the filing of the Bill, and whether he was entitled in respect of such shares to participate in the assets of the Company. Under this order, the Chief Clerk called upon the claimants above named to show that the shares bought by them after the filing of the Bill had been purchased of persons who were bona fide holders prior to the filing of the Bill.

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The several claimants had filed affidavits, and *Phillips* and *Lowndes* had been cross-examined.

The evidence as to the claimants other than *Lindo* was, that they had purchased on the Stock Exchange, and did not know who their vendors were; but *Phillips* and *Lowndes* stated, on cross-examination, that they had heard, previous to their purchasing, that some proceedings were on foot to recover money from the Directors for the scrip-holders, but that they did not know the nature of the decree; and similar knowledge was assumed against the other persons similarly situated. *Lindo*, by his affidavit, stated that he had, prior to the filing of the Bill, purchased several shares in the Company; and that, believing he should sustain a considerable loss, he purchased other shares from various persons, at prices averaging 3s. 6d. per share, for the purpose of reducing that loss; and he said, that when he so purchased, he was not possessed of any information, as solicitor to the Plaintiff, which was not, or might not have been, equally known to all the shareholders in the Company; and he stated that he had not purchased any shares since the decree.

Under these circumstances, the Chief-Clerk referred the following questions to the Court:—

First.—Whether the persons who were not the holders of any of the shares (part of the 40,000) for value before the filing of the Bill, but who now hold such shares without showing that their title is derived from such last-mentioned holders of shares, are entitled to participate in the funds; and if so, whether at per share, or on the amount they paid per share?

Second.—Whether *Lindo* is entitled to participate at all in respect of the shares bought by him since the filing of the Bill; and if so, at what rate?

Mr. *Roxburgh* (with whom was Sir *Hugh Cairns*, Q.C.) for the Official Manager, stated the question to the Court.

Mr. *Stanston*, for the Defendant *Denny* :—

It is impossible to treat these purchases as valid, without depriving the accountable parties of all the benefit given them by the order on further consideration.

At any rate, the holders can only recover a dividend on what they actually paid, not on the nominal value of the shares : the latter course would have the effect of putting them in a better position than the original bona fide shareholders.

As to *Lindo*, if this matter were a bankruptcy, the case would be concluded by authority : *Ex parte Lacey* (a), *Ex parte James* (b), *Ex parte Bennet* (c).

Mr. *Giffard*, Q.C., and Mr. *Bovill*, for the Defendant Sir *Edward Belcher* :—

There never was any real *litis contestatio* as to the suspected shares. These shares were a mere chose in action, and no one could buy them without being bound by his vendor's equities.

Mr. *Jessel*, for *Lindo*.—The declaration only points to “ bona fide holders,” not adding the words, “ without notice ;” and I am a holder for value actually paid, therefore a bona fide holder. I gave 3s. 6d. a share for these shares ; and the second inquiry, which is merely pointed at my position as Solicitor of the Plaintiff, has not any operation till there is some reason to believe that I shall get more than that ; whereas, in the present case, I shall at most only get 1s.

Mr. *Roxburgh* in reply.—This is a Cost Book Company, and the shares pass by delivery of the scrip certificates. If no one could make a title to such shares after the insti-

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(a) 6 Ves. 625.

(b) 8 Id. 337.

(c) 10 Id. 381. And see *Pooley v Quiller*, 27 L. J., Ch., 180.

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tution of a suit, the mere existence of the suit would put an end to the undertaking; which cannot be supposed. It is perfectly impossible to get any evidence to enable us to trace transactions on the Stock Exchange. These shares were purchased in open market.

Unless you are prepared to say, that no one can sell his shares in such a Company after a Bill has been filed against the Company, which is just the time when speculative purchases are rife, you must uphold the claim of these holders.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

I think there cannot be any question as to the meaning of the decree. The course taken was, that the gentlemen who are bound to indemnify the general body of shareholders, desired an inquiry in order to ascertain who are bona fide holders of the suspected shares. Upon this there were three distinct inquiries ordered, or rather a declaration made and two inquiries directed, beginning with a direction to apportion the fund in the hands of the official manager amongst the holders of original shares and such of the bona fide holders of any of the 40,000 shares as should establish their claims as therein pointed out. [His Honour read the passage from the order.]

Then a point is made as to who are intended by the term 'bona fide holders.' I think that was clearly aimed at persons who had held their shares before the Bill was filed. I arrive at that conclusion thus :— I do not look on scrip certificates of this sort as mere choses in action, nor as importing notice to every holder. I did not treat them so; but I allowed those who purchased before there was a possibility of notice, that is, before Bill filed, to retain all the advantages of their purchase, considering them as bona fide holders, some-

what on the analogy of purchasers of bills of exchange during their currency; others were not so considered: but then the other branch of the declaration was introduced in their favour, viz. that if any one held by a title derived from a person who would himself have been entitled to rank as a bona fide holder, i.e., who purchased before bill filed, he was to be entitled to stand in the place of his vendor.

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The result of that was to throw it upon every one who purchased after bill filed, to shew that his vendor had been a bona fide holder before bill filed; of course, if that were not so, the vendor might have been one of the very persons who took the fraudulent shares in the first instance.

Then I am told that the inquiry involves an impossibility. How (said Mr. *Roxburgh*) can a man who buys shares in open market on the Stock Exchange, know anything about the man from whom he bought them? And how can any man venture to buy shares in the market, if he is to be hampered with the prior title? It seems to me that the simple answer to that argument is, (and I do not think that I am creating any difficulty as to dealings with shares in general), that, as soon as the Bill was filed, persons dealing with these shares must be taken to have known that a grievous fraud had been committed, and that it was the desire of persons who would be affected by the fraud to protect themselves from the consequences thereof, and therefore they must be taken to have purchased shares which they knew to have been issued in fraud; and from this it would naturally follow, that such purchasers could not stand higher than their vendors.

I must therefore hold, that these claimants cannot establish a right against the fund, unless they can show that the persons from whom they purchased were bona fide

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holders for value before bill filed. If that is not susceptible of proof I cannot help it.

Then, as regards *Lindo*, the additional inquiry directed as to him did not in any manner relieve him from this onus; and I must add, that I do not think that he can be held to have established his claim.

Some point was made as to restricting the proof in respect of these shares; but I cannot assent to that view. Any one entitled to prove must prove like any other shareholder.

The costs of all parties of this application to be paid out of the fund in the winding up.

April 30th.
 Practice—
 Costs—Motion.

MORGAN v. GREAT EASTERN RAILWAY
 COMPANY.

On a Defendant submitting to Plaintiff's demands, the Plaintiff ought not to bring the cause to a hearing without first applying for Defendant's consent to have the costs disposed of on motion. But if the Defendant objects to that course, a motion that the Defendant may pay the costs of the suit, will be refused.

Argument.

IN this case, Mr. *Daniel*, Q.C. and Mr. *Bird*, on behalf of the Plaintiff, moved to stay proceedings; and that the Defendants might be ordered to pay the costs of the suit.

The Bill was for an injunction to restrain the payment of certain dividends. The Defendants had subsequently submitted to the Plaintiff's demand, and the injunction was thereupon dissolved, the whole object of the suit having been attained.

Mr. *Rolt*, Q.C., and Mr. *Wigram*, for the Defendants:—
 We have not consented to the costs being disposed of on motion, and the suit must be brought to a hearing: *Wilde v. Wilde (a)*.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The practice seems to be this:—According to *Sivell v. Abraham* (a), a Plaintiff under these circumstances is bound to make an application to the Defendant to have the costs disposed of on motion, and, unless he does so, is precluded from having the extra costs occasioned by going on to a hearing. But if the Defendant refuses to allow the matter to be disposed of on motion, *Wilde v. Wilde* decides that the case cannot be so dealt with. Here the Defendants do object. The motion therefore must be refused.

(a) 8 Beav. 596.

1863.
MORGAN
v.
GREAT
EASTERN
RAILWAY COM-
PANY.
Judgment.

RE ENGLISH AND IRISH CHURCH AND
UNIVERSITY ASSURANCE SOCIETY.—No. 1.

HUNT'S ANNUITY CASE.

THE *English and Irish Church and University Assurance Society* was registered on the 30th of July, 1853, and was ordered to be wound up on the 4th of November, 1861.

The Petitioner *Catherine Hunt*, on the 5th of September, 1855, purchased from the Society an annuity of £150 for her life.

The annuity deed witnessed, that, in consideration of £1600, "the funds and property of the said Society shall, according and subject to the deed or deeds of settlement of the said Society, be liable to pay to the said *Catherine* annuity, without taking any preliminary proceedings to establish the amount as a debt.

1862.
Dec. 19th, 20th.
Winding-up
Acts—Insol-
vent Company
—Proof of
Value of An-
nuity.

Under a winding-up, subsequent to the Winding-up Amendment Act of 1857, and prior to the Joint Stock Companies' Act, 1862—*Held*, that, on the Company being found to be insolvent, an annuitant was entitled to prove under the winding-up for the estimated value of the

33 Bea: 546. 1 Law Rep. N L 13.

1862.

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AND IRISH
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Statement.

Hunt or her assigns, during the whole continuance of her life, the annuity or yearly sum of £150," by equal half-yearly payments, on the 10th of November, and the 10th of May, in every year. And the deed contained the following proviso :—

" Provided also, that the capital stock, and other the funds and property of the said Society applicable to the payment of life annuities, shall alone (subject however to all prior claims and demands thereon in pursuance of the provisions of the said deed or deeds of settlement,) be liable to answer and make good all claims and demands upon the said Society in respect of this policy. And that the remedy of the said assured, and of every other person or persons making any such claim and demand shall be against the Society collectively and the funds of the said Society, and not against the proprietors or other holders of shares in the capital of the said Society individually. And that neither the Directors signing this policy nor any other proprietor or other holder or holders of shares in the capital of the said Society, shall be liable in respect of any such claim or demand, further or otherwise than to pay to the funds of the said Society so much and such part of his, her, or their share or shares in the said capital as shall not for the time being have been paid up ; and that all liability in respect of this policy of any proprietor or other holder or holders of shares in the capital of the said Society, shall, upon the full amount of his, her, or their share or shares in the said capital being paid up, absolutely cease and determine."

The annuity deed was under the seal of the Company, countersigned by three Directors.

The annuity had remained unpaid since the 10th of May, 1861.

In October, 1861, a notice was sent to the annuitant from the Society, stating that the Society "had from the 30th of June last been amalgamated with the *British Nation* Life Assurance Association, where the business would thenceforth be carried on," and also a notice from the *British Nation* that the terms of all policies would remain unaltered.

On the 12th of March, 1862, the manager of the *British Nation* wrote to Miss *Hunt*, to the effect that a cheque for the amount due on her annuity was ready for her.

The annuitant never did any act to assent to the transfer of the business, and now claimed to prove for the value of her annuity.

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Statement.

Mr *Chitty*, for the annuitant, relied on *Evans v. Coventry* (a) as establishing the right to prove for the value of an interest of this description.

Argument.

Mr. *Little*, for the Official Manager.—The case of *Evans v. Coventry* was not under the Winding-up Acts, and has therefore no application to this case, which must be governed by the language of the statutes, and that does not authorise a proof on the valuation of a claim such as this.

The Winding-up Act, 1848 (11 & 12 Vict. c. 45), provides, by sect. 58, that the rights and remedies of creditors are not to be enlarged or altered. It is true, that the 74th section enacts that proof shall be made in the same manner as in bankruptcy; but that is evidently meant to incorporate the practice as to the mode of proving debts, not to alter the extent of the rights of creditors, which is fixed by the earlier section; and, therefore, the clause in the Bankruptcy Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 175), giving an annuitant power to prove for the value of his annuity, is not incorporated in winding-up proceedings, which, until the recent Act (25 & 26 Vict. c. 89, s.

(a) 5 D. M. G. 911; 3 Dr. 75; 23 L. J., N. S., 489; 26 Id. 400.

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Argument.

158), did not include the privilege of proving for contingent debts, and, in fact, were not originally proceedings for the benefit of creditors at all, but merely for the purpose of contribution among the partners inter se. This is not a case under the recent Act, and, therefore, no proof for contingent debts is admissible. We are a company having a power of dissolution, which we have chosen to exercise; and in doing so we have made ample provision to secure all persons in the position of this annuitant, by finding another responsible company which will undertake the obligation. To pay this annuitant the full estimated value of her contingent claim would be a wrong to the other policy holders.

[The VICE-CHANCELLOR.—That was done in *Evans v. Coventry*.]

Mr. *Little*.—That was not under the Winding-up Acts. [He referred to *King v. Accumulative Company* (a).]

Mr. *Speed*, for the Creditors' Representative.

Mr. *Chitty*, in reply.—I do not rely at all upon the clauses in the Bankruptcy Act, which may or may not be imported, but on the principle of *Evans v. Coventry*, which is just as applicable to a winding-up case as to an ordinary suit. It is to be observed, that a creditor is defined by the Winding-up Act, 1848, to be any person having any debt or demand enforceable at law or in equity. *Evans v. Coventry* shows that we have a demand enforceable in equity for the full value of the annuity, and therefore we may prove for the amount. The present winding up was subsequent to the Act of 1857 (20 & 21 Vict. c. 78), by which a winding-up became, by the institution of the creditors' representative, a proceeding for creditors and not for the partners alone. Even an executor is bound to set aside funds for future claims: *Johnson v. Mills* (b).

(a) 8 C. B., N. S., 151.

(b) 1 Ves. sen. 282.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is a question of some importance in principle. The claim is to prove, under a winding up (not under the last Act), for the value of an annuity granted by the *English and Irish Church and University Assurance Society*.

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SOCIETY.
Dec. 20th.
Judgment.

The argument against the proof is, that, according to the true effect of the contract, there is no actual debt at present, and therefore the annuitant ought not to be admitted to prove as a creditor. In one sense it is true enough, that, until the recent Act, which does not apply to this case, no legislative provision was made for proof as under a bankruptcy in respect of a claim of this description, the original statutes having been framed for the relief of the partners only, and requiring creditors to prove merely in order to enable those interested in the partnership to ascertain the extent of their common liabilities. Subsequently, it was found that the creditors generally obtained payment out of the assets administered in the winding-up proceedings, and not by any independent action of their own; and then it was enacted, that the creditors should appoint a representative, and should be deprived of their liberty to take proceedings of their own, unless with the leave of the Court. The same Act also provided that the Court might order a dissolution. This was the state of the law when the winding-up order was made in this case. What I have to consider, therefore, is the position of a creditor against the assets of a company upon a dissolution.

Upon the authority of *Evans v. Coventry*, I must hold, that, as against the assets of a dissolved and insolvent company, a creditor in the position of this annuitant is not bound to wait until the covenanted payments become due, but is entitled to prove for the present value of the claim.

The question, no doubt, as it came before Vice-Chancellor

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Judgment.

Kindersley, was one of great difficulty ; but he decided the point, and his decree was, in substance, affirmed by the Lords Justices. The difficulty took this shape : Were the insurers in a company which became insolvent to continue paying their premiums, taking their chance of the company becoming solvent, but also running the risk of finding that when their claims matured there were no assets to meet them ? That and other difficulties were all pointed out by the Vice-Chancellor, the policies there being in some instances to assure sums payable on sickness, an event which might never occur. Under those circumstances, the Court held that all the claimants were to be let in to prove for the value of their claims.

My only doubt has been this—whether the principle so settled can be applied immediately to a proof under the Winding-up Acts, or whether it might not be necessary for the creditors to go through the form of filing a bill to establish their claims to be let in to prove before me in these proceedings. The necessity for some steps to establish the equitable debt before proof, was insisted on in the argument, on the ground that the Acts provide that the rights of creditors are not to be altered by force of the winding-up proceedings. But if the Act gives a power to dissolve, and the Court does dissolve the company, the consequences of dissolution must follow ; and on being satisfied that there is no doubt as to the insolvency of the company (as to which, if necessary, I will direct an inquiry,) I must hold that any person having a claim in the character of an annuitant has a right, not by force of the Winding-up Acts, but from the circumstances of the case, to be regarded in equity as a creditor, and—without the form of establishing the debt by a suit—to be admitted to prove for the value of the claim. This assumes that the Company is not solvent ; but, if desired, there will be an inquiry as to that.

Mr. *Little* elected to have such an inquiry, and said that the Official Manager was willing to pay the arrears already accrued.

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Minutes.

ORDER an inquiry whether the Company is solvent. The Official Manager to pay the arrears of the annuity up to the present time.

The annuitant to have the costs of the application; and the costs of the Official Manager and of the Creditors' Representative, not exceeding £5, to be allowed.

Ref. 462 - 1 Def. J & S. 637-

RE ENGLISH AND IRISH CHURCH AND UNIVERSITY ASSURANCE SOCIETY.—No. 2.

1863.

*February 19th,
May 6th.*

THE *English and Irish Church and University Assurance Society* was registered in the year 1853, under the 7th & 8th Vict. c. 110.

The law of partnership is a branch of the law of agency, and the test of partnership is not simply whether the al-

leged partner was to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency, and a ground for inferring it in certain cases.

An Assurance Society granted policies both in the participating and non-participating form. The former class stipulated that the funds and property of the Society should, subject to the deed of settlement, be liable to pay the sum assured, with such further sum as should, pursuant to the rules of the Society, be appropriated by way of bonus or addition, with a proviso declaring that the funds of the Society should alone be liable, and negating personal liability. The latter class stipulated that the funds and property of the Society should, subject to the deed, be liable to pay the sum assured, with a proviso that the funds of the Society, by the deed applicable to the payment of policies, should alone, subject to prior claims thereon, pursuant to the deed, be liable, and negating personal liability.

The deed provided that the actuary should estimate the amount of profits, that this estimate might be rejected or reduced by a meeting of shareholders, and that six-tenths of the divisible profits so ascertained should be apportioned by the actuary, as he thought fair, among the participating policy-holders:—*Held*, that such policy-holders were not partners.

Held also, that claimants under both classes of policies were entitled to be paid out of the assets (the Company being in course of winding up) *pari passu* with general creditors, as to whom the liability of the shareholders was unlimited.

The assets in hand being insufficient to provide for all claims, *held*, that the general creditors were entitled, in the first instance, to be paid *pari passu* with the policy-holders, notwithstanding the possibility of their recovering further sums from individual shareholders; and that the question of marshalling did not at that stage arise.

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The deed of settlement of the Company, dated the 27th of June, 1853, contained provisions to the following effect :—

Clause 1. "That the parties of the first and second parts, all of whom are hereinafter distinguished by the title of proprietors, and the several other persons who shall become proprietors as hereinafter mentioned, shall, while holding shares in the capital of the Society, be and constitute a joint-stock company under the name of *The English and Irish Church and University Assurance Society*. . . ."

By clause 5, the capital, subject to certain powers of increasing or reducing the same, was fixed at £100,000, in 20,000 £5 shares.

By clause 6, all persons who subscribed for or acquired shares were to be admitted as proprietors.

By clause 10, and the following clauses, annual general and extraordinary meetings were directed to be held of the proprietors, to whom votes were given according to the amount of their shares.

Clause 75. "That, for affording greater facility and protection to dealings of the said Society with the purchasers, borrowers, lenders, persons effecting guarantees or indemnities, and others, every deed to which the common seal of the said Society shall be fixed, shall, in favour of any person or persons, or body or bodies politic or corporate, other than the said Society, by, to, or with whom such deed shall be made, and of all claimants through or under them, be absolutely binding and conclusive upon the said Society, and exonerate such person or persons . . . from all liability to take notice of any of the provisions herein contained, any rule of equity to the contrary notwithstanding ; and the production of such deed, with the said common seal affixed thereto, shall be for all the purposes of such deed conclusive evidence against the said Society."

Clause 77. "That, except as herein specially provided, the board of directors shall not contract any debts on behalf of the Society other than such as shall and may be necessary for carrying the objects and purposes of the Society into effect."

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By clause 99 the directors were empowered to issue policies.

Clause 103. "That all policies . . . shall be signed by three directors at least, and sealed with the common seal of the Society; and all policies . . . so signed and sealed shall be binding on the said Society."

Clause 104. "That there shall be inserted in every policy, guarantee, or indemnity to be issued or given or granted by the Society, and in every other contract to be entered into on behalf of the Society in or about the premises, a clause, condition, or proviso limiting the scope and effect of the contract thereby created, and providing that the capital and funds of the said Society for the time being undisposed of according to the deed of settlement, shall alone be answerable for any claims under such policy, guarantee, or indemnity, and negating an unconditional liability; and that no director or member of the Society shall, upon any account or pretence whatsoever, be subject or liable to any demand in respect of such policy, guarantee, or indemnity, further than to pay to the funds of the Society the full amount of his obligation for the time being in respect of his or her shares in the capital stock of the Society."

Clause 105. "That it shall be lawful for the directors to insert in or attach to all or any policies, guarantees, or indemnities, or other grants or instruments to be issued, granted, or given by them, or under their authority or direction, such general or special conditions, clauses, stipulations, and agreements as they shall, from time to time deem expedient."

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Clause 116. "That persons effecting assurances with the Society shall be divided into two classes: one of such classes to be called 'The Participating Class,' and the other of them 'The Non-participating Class;' and the directors shall have power to make such differences in the amount of the rates of premium to be paid by persons effecting assurances who shall be of the participating and non-participating classes respectively, as to them shall seem expedient."

Clause 117. "That the participating class shall be entitled to share in the profits of the Society in the manner hereinafter mentioned; but the non-participating class shall not be entitled to share in any of the profits hereinafter mentioned."

The 132nd clause provided that the directors should be indemnified out of the funds and property of the Society against all loss in consequence of any contracts entered into on behalf of the Society, or any acts done in carrying the objects and purposes of the Society into effect.

Clause 172. "That there shall be created by the directors, in manner hereinafter mentioned, out of the moneys and property of the Society, two separate funds, to be respectively denominated 'The Paid Capital Fund' and 'The General Fund;' and that separate and distinct accounts of such respective funds shall be kept in the books of the Society."

Clause 173. "That the moneys arising from payments made and to be made in respect of the shares in the capital of the Society, shall be kept as a distinct fund in a distinct account, and shall be denominated 'The Paid Capital Fund.' "

Clause 174. "That the dividends, interest, and proceeds of the fund called the Paid Capital Fund, and the premiums and other moneys to be received upon or in respect of all

assurances, endowments, indemnities, and guarantees respectively issued, given, and granted by the Society, and the moneys to be received under or in respect of grants by the Society, and all forfeitures and accumulations of what shall be so received, and generally all other of the moneys of the Society not belonging to or to be carried to the paid capital fund, shall be carried to another account, and kept as a distinct fund, to be denominated 'The General Fund.' "

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Clause 175. "That the general fund of the Society shall be first applicable to, and shall be applied in, payment of all claims on the Society in respect of the assurances of both classes, and in respect of endowments, guarantees, and indemnities and grants, and in payment of all other liabilities of the Society, and of interest to the proprietors on their paid-up capital, and of such bonuses as are hereinafter authorised to be given to the assured of the participating class, and also in payment of the costs and expenses of and incidental to the establishing and setting on foot the Society, including the costs of these presents, and the outfitting, furnishing, repairing, and altering the house or office of the Society, and all other preliminary expenses prior to complete registration, and also in payment of all costs and expenses of the Society, and generally of carrying on the business of the Society and incident thereto; and in case the general fund cannot with convenience be made available or productive in time to meet such payments, or shall be insufficient to meet the same, then and in such case (but not in any other case) a competent part of the paid capital fund shall be applied to answer and make good such deficiency; and whenever the paid capital fund shall be resorted to, the sum or sums to be borrowed or taken therefrom shall, as soon as can be and circumstances will admit, be repaid and replaced out of the general fund, which shall in the meantime be charged with the same."

Clause 176. "That the costs, losses, and expenses relating

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or incident to the investment in any manner howsoever of the paid capital fund or the profits thereof, or any part thereof, shall be borne and paid by and out of such fund and profits respectively; and the costs, losses, and expenses relating or incident to the investment in any manner howsoever of the general fund or the profits thereof, shall be borne and paid by and out of such fund and profits respectively."

Clause 177. "That interest on the amount of capital actually paid up, at a rate not exceeding £5 per cent. per annum, shall commence from the 1st day of July, 1853, and shall be due annually on the 1st day of July in every year, and be payable to the proprietors at the expiration of forty days from each of those days respectively out of the profits of the Society, and the accruing interest on each share shall be annexed to and pass inclusively with the share from which it shall arise, or any transfer of that share between any two days of payment."

Clause 178. "That, previously to the annual general meeting, to be held in the year 1859, and afterwards at every fifth annual general meeting, or oftener if the directors shall from time to time think fit, the directors shall cause to be made by the actuary or consulting actuary for the time being of the Society, a valuation of all the liabilities and assets of the Society up to the 31st day of December in the preceding year, and shall cause a report in writing to be prepared, containing a clear and faithful exposition of the state of the affairs of the Society, and showing distinctly the state of the funds and property of the Society, and the profits thereof, and the surplus (if any) of the general fund, after valuing and deducting all unsatisfied claims, and the computed value of all the liabilities of the Society, and all such other particulars as the directors shall think necessary or proper for enabling the proprietors to form a just estimate and opinion of the real

state of the affairs, funds, and property of the Society; and such account and report shall be signed by the actuary or consulting actuary of the Society for the time being, and by the principal actuary for the time being, at the foot of such report; and such report shall state whether or not, after making ample provision for all the existing and contingent liabilities, risks, claims, and demands to which the property of the Society may be subject, there remains such a surplus of the general fund as will justify any division of the profits amongst the participating class of assurers and the proprietors of the Society; and the amount of such surplus, and such account and report shall be submitted by the Chairman of the said annual general meeting to the consideration of such meeting; and if a majority in number of the votes of the proprietors present, either personally or by proxy, at such meeting shall approve of the report in regard to the surplus of the general fund, and the recommendation as to a division of such surplus of the general fund amongst the participating class of assurers and the proprietors to the extent recommended by the report, or to any less extent in case such division of the same shall be recommended as aforesaid, then such surplus shall be divided, and, subject to such deduction as shall be made thereout pursuant to the next succeeding clause of these presents, shall be paid by way of dividends to and amongst the participating class of assurers and the proprietors of the Society, in the proportions following (that is to say): Six equal tenth parts thereof shall be allotted to and divided amongst such of the assured of the participating class as shall, on the day of declaring such dividend as aforesaid, hold a policy or policies in that class, and which division shall be made by the actuary or consulting actuary for the time being of the Society, and upon such principles as shall appear to such actuary or consulting actuary to be fair and equitable, and shall be paid to or applied for the benefit of the assured in the participating class in manner

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hereinafter mentioned ; and the remaining four equal tenth parts of the same profits shall be divided amongst the proprietors for the time being of the Society in proportion to their shares in the Society, and shall, subject however to such deduction as shall be made thereout in pursuance of the provisions of the next succeeding clause of these presents, be paid to the said proprietors in manner hereinafter mentioned ; and the board of directors shall cause every such dividend to be payable at the house or office of the Society, or at such place as they shall appoint, within one calendar month from the time when the same shall have been declared."

The 179th clause empowered the directors, after the general meeting should have agreed upon a division of profits among the participating class of assurers and the proprietors of the Society, to apply one-half of that portion of the profits attributable to the shares of the proprietors of the Society for the benefit of the Friend of the Clergy Society.

Clause 181. "That the directors shall forthwith, after a dividend of the profits shall have been declared, proceed to pay, apply, and distribute the same in the manner next hereinafter mentioned, that is to say, to pay six equal tenth-parts of the profits agreed to be divided as aforesaid to and amongst such of the assured of the participating class as shall, on the day of declaring such dividend as aforesaid, hold a policy or policies in that class, according to the division which shall have been made by the actuary or consulting-actuary for the time being of the Society, in manner hereinafter mentioned ; and also to pay to the proprietors of the Society the residue of their shares in the said profits, after such deductions thereout (if any) as aforesaid, according to their shares in the capital of the Society. Provided always, that it shall be at the option of any of the persons entitled to a share in the profits so to be divided as assurers in the participating class, upon his,

her, or their giving one calendar month's notice in writing of his, her, or their choice, that the share of the party giving such notice as last aforesaid, after such deduction thereout (if any) as aforesaid, shall, instead of being paid out to him, her, or them, as lastly hereinbefore provided, be applied either as an increase or an addition to the sums assured by his, her, or their respective policies, or in reduction of the premiums payable on such policies. And it shall be lawful for the directors, if they shall see fit, to allow the assured, or any of them, who shall have declared such option as aforesaid, to charge the same at their then next division of profits, but without prejudice to the arrangement in consequence of the first declaration of such option, so far as regards the share of profits the subject of such option. And further, that the several calculations necessary to be made for the several purposes expressed in this clause, shall be made by the actuary or consulting-actuary for the time being of the Society, or some other person or persons to be approved of by the directors should the office of actuary or consulting-actuary be vacant; and such calculations, and the result thereof when delivered in by the secretary, actuary, consulting-actuary, or such other person or persons as aforesaid, and allowed by the major part in number of the board of directors, shall be deemed and taken to be correct, and, notwithstanding the subsequent discovery of an error or errors therein, shall be absolutely binding and conclusive on all persons whomsoever."

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Clause 198. "That every proprietor of the Society, his or her executors and administrators, as between him, her, or them, and the other proprietors of the Society, and their respective executors and administrators, shall be answerable and accountable and liable for or in respect of the calls, debts, losses, and damages of or upon the Society, in proportion to his or her share and interest for the time being

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in the funds or property of the Society, but not further or otherwise."

On the 4th of November, 1861, an order was made for winding-up the Company, under which proofs had been admitted by persons claiming, upon the deaths of the assured, under policies both of the participating and non-participating classes, and also by general creditors under contracts not containing any limitation of liability. There was also one proof in respect of a current annuity, which had been allowed by the Court (*ante*, p. 79); but with this exception no claim had been made by the holders of current policies, a transfer to another office having been generally accepted.

The participating policies, after the usual recitals, proceeded in the following form :—

"Now these presents witness, and it is hereby agreed and declared on behalf of the said Society by the three directors hereof whose names are hereunto subscribed, that (in the event of death and payment of premiums) the funds and property of the said Society shall, according to the provisions of the deed or deeds of settlement, and the rules and regulations of the said Society, be subject and liable to pay and make good to the executors, administrators, or assigns of the said . . . the full sum of . . . together with such further sum or sums (if any) as shall, pursuant to the rules and regulations of the said Society, be appropriated by way of bonus or addition to the sum hereby assured." [Then followed a proviso that the policy should be subject to the conditions indorsed, and another in these terms :]—"That the funds and property of the said Society shall alone be liable to answer and make good all claims and demands in respect of this policy, and that no director or shareholder of the said Society, or any other person, shall in any action, suit, or proceedings, or upon any claim or demand

whatsoever in respect of this policy, be in anywise subject or liable for any sum of money beyond the amount (if any) for the time being recoverable by the said Society from such director, shareholder, or other person, in conformity with the provisions of the deed or deeds of settlement in force at the date hereof."

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The non-participating policies were, in substance, to the same effect, except that they omitted the clause as to bonus, and contained an express proviso that the policy should not entitle the assured to participate in the profits of the Society and that the proviso limiting the liability was in the following different form: "Provided also that the capital stock or other the funds and property of the said Society, by the provisions of the deed or deeds of settlement of the said Society applicable to the payment of moneys assured by life policies, shall alone, *subject, however, to prior claims and demands thereon in pursuance of the provisions of the said deed or deeds of settlement*, be liable to answer and make good all claims and demands upon the said Society in respect of this policy, and that the remedy of the said assured, and of every other person or persons making any such claim or demand, shall be against the Society collectively and the funds of the said Society, and not against the proprietors or other holders of shares in the capital of the said Society individually; and that neither the directors signing this policy, nor any other proprietor or other holder or holders of shares in the capital of the said Society, shall be liable in respect of any such claim or demand, further or otherwise than to pay to the funds of the said Society so much and such part of his, her, or their share or shares in the said capital, as shall not for the time being have been paid up."

All the policies were executed under the hands and seals of three directors; but it did not appear that the seal of

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the Company was affixed. Those, however, which had become claims by death had been admitted to proof.

A sum of upwards of £8000 had been realised out of the assets, and by calls; but the debts proved largely exceeded this amount.

A summons was taken out by the Creditors' Representative calling on the Official Manager to apportion the fund in hand, and was adjourned into Court for the purpose of obtaining the direction of the Court as to the principle of distribution.

Argument.

Mr. *Rolt*, Q.C., and Mr. *Little*, for the Official Manager, who, by arrangement, was to represent the shareholders only. —The questions to be considered are, as between the general creditors, the two classes of policy holders, and the shareholders. If the assets of the Company are insufficient to pay all the debts (and up to the present time a sufficiency has not been got in), the general creditors will have a resort to the unlimited liability of the shareholders, from which the policy-holders are debarred by the terms of their contract; and the policy-holders on this ground claim to have the assets and the produce of the calls applied first, by a species of marshalling, in payment of their claims. A second question is, whether the participating policy-holders are not in fact partners, and excluded from all claim, at any rate until the other claimants are satisfied.

As to the first point, the case is not like the ordinary case of marshalling. Here the policy-holders have contracted not to pursue the individual shareholders, but to take payment out of the assets of the Company; and their contract precludes them from asserting any claim to throw the general creditors upon their personal remedies against the shareholders, and so indirectly to increase from this source the fund available for the payment of policies. To marshal in the way they desire would, in effect, be to give them the very benefit which they contracted not to claim.

Further, their claim is limited to the funds and property of the Society, which must mean the surplus assets after payment of debts. All general debts must, therefore, be paid before we arrive at the fund applicable to policies, and what remains is alone liable to these claims.

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These observations apply to both classes of policy holders; but there is a further consideration, which must exclude the participating policy holders altogether. They share the profits (clause 117), and are partners in the eye of the law. That being so, they must bear the losses, and cannot prove as creditors at all until every other creditor has been satisfied. The terms of their policies give them such bonuses as may be appropriated according to the rules and regulations of the Society; and these regulations say, that they are to have six-tenths of the profits, to be estimated in the manner directed by the clauses 117, 178, and 181 of the deed of settlement. [They cited *Re Athenæum Ex parte Prince of Wales Society (a)*; *Lindley* on Partnership (b).]

Mr. Willcock, Q.C., and Mr. Speed, for the Creditors' Representative; appearing by arrangement for the general creditors.—The only question which affects us is our right to be paid out of the fund in hand *pari passu* with, if not in priority to, the policy holders.

Even supposing the policy holders not to be limited to the fund remaining after the payment of debts properly so called, there is no pretence for any claim of priority by them over the general creditors. As creditors, we have a right to prove and be paid out of the assets which are available, and are not to be deprived of a clear right, and thrown upon the chances of litigation against shareholders personally, merely because the policy holders have chosen to contract themselves out of part of their rights. [They cited *Wallis v. Woodyear (c)*.]

(a) Johns. 633.
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(b) Vol. 1, p. 85.
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(c) 2 Jur. N. S. 179.

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Mr. *Daniel*, Q.C., and Mr. *Millar*, for non-participating policy holders.—The policy holders have a right by the terms of their contract to have the property of the Society applied in payment of their claims; and the Society was in fact a trustee of that fund, as was in effect decided in *Law v. The Indisputable Society* (a), *Robson v. M'Creight* (b). The whole difficulty has arisen from the misapplication of this trust fund; and it is clear that neither the Society nor their general creditors (who claim through the Society, and can have no better right than they) can touch this fund until they have satisfied the prior claims upon it, namely, those of the policy holders of the non-participating class. [They also referred to *Evans v. Coventry* (c).]

Mr. *Fischer*, for participating policy holders:—

These policy holders are not partners. In the first place, the deed expressly declares who the partners are, viz. the proprietors of the shares, and no one else; and they alone have votes, and the right of attending at the meetings (clauses 1, 6, 10). The same view is confirmed by the whole machinery of the Society. Two distinct funds are provided, the one being the partners' fund, the other the fund applicable to the claims of policy holders of either class and to the general liabilities of the Society. The latter, which is called the general fund, is made up of all payments except the shareholders' contributions; and if the fact of paying a premium which goes into this fund makes a policy holder a contributor to the expenses of the concern, the same might be said of every debtor and every lender who made a payment or an advance to the Company. The policy holders do not in any way contribute to the capital. Neither do they share the profits. The provisions of the deed leave the amount to be given by way of bonus absolutely dependent on the

(a) 1 K. & J. 223.

(b) 25 Beav. 272.

(c) 25 L. J., N. S., 489; 26 L. J., N. S., 400.

decision of the shareholders. The actuary is to advise what division shall be made; and this may be reduced ad libitum by a general meeting, at which the bonus policy holders have no right to be present. Further, they have no right under the deed to any account whatever (clauses 172—178). Therefore the policy holders, neither contributing to capital nor receiving profits, nor being entitled to accounts, are not partners, even according to the letter of the definition which is relied on.

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But, in fact, the definition is not rightly stated. It is not true that the receipt of a share of profits, even as such, makes a man necessarily a partner, though it may be one of the most cogent evidences from which to infer partnership. The correct test is the mutual agency of the partners, and the share of profits is only an element in inferring such agency. This is the doctrine settled by *Cox v. Hickman* (a). The policy holders were never intended to be partners, they never held themselves out as such, and no one pretends that credit was given to them by any one who trusted the Company. They have, therefore, the same right as all other creditors to be paid out of the assets of the Company.

Mr. Little, in reply :—

The argument in favour of the participating policy holders is disposed of by *Story's* dictum, mentioned with approval by Lord *Wensleydale* in *Cox v. Hickman*, the case on which the other side rely. All the tests of partnership there laid down are satisfied in this case. The participating policy holders contracted for a share of the profits, and they, by their premiums, contributed to the capital stock. This is apparent from the clauses of the deed as to the two funds (117, 172—175). From these facts the partnership agency is implied. *Cox v. Hickman* itself was quite a different case—that of creditors under a composition deed.

(a) 8 H. L. Ca. 268.

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Then, again, how can the policy holders touch the assets until the debts are paid? The balance is all that can be called the property of the Company, and that is the only fund applicable to payment of policies. Further, the general fund is liable to guarantee the directors (clause 132); and creditors may sue the directors, and so indirectly establish their claims against the fund.

The 77th clause prohibits the contracting of debt by the directors, except for specified purposes; and a large part of the profits are for money borrowed to the extent of £30,000.

[The VICE-CHANCELLOR.—If the proofs have been admitted, it is too late to contend that these are not good debts; but, before giving judgment on this summons, I must ascertain what has been already done in this respect. If any question remains open as to the validity of particular classes of debts this motion has been brought on prematurely.]

May 6th.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case stood over in consequence of its being necessary to make some inquiry as to the rights of certain creditors who claimed to be interested in the matter in question. That matter has been cleared up, and the case has now to be determined upon the argument which I heard in February last.

The case comes from Chambers upon a summons taken out for the purpose of ascertaining the proper mode of dealing with the debts established against the Company.

The Company is one of those in which the shareholders have entered into an arrangement inter se, that a given sum only shall be called up in respect of capital; and that, after that amount is paid, no shareholder shall be subject to any further liability. Such a stipulation is, of course,

inoperative to limit the liability of shareholders to general creditors of the Company, though it binds those who have made contracts with the Company in which this limitation of liability is introduced. There being a class of general creditors claiming to enforce their demands to the full extent of the means of the shareholders to answer them, the question becomes of considerable importance to those shareholders how the assets which have been got in are to be applied.

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The debts are of three classes: First, the general creditors, who are not affected by any limitation of liability of the shareholders; secondly, the holders of policies, which I will call ordinary policies, to distinguish them from participating or bonus policies, who are only to be paid out of funds which are described in the policies in terms the exact effect of which is one of the points to be determined; and, thirdly, the holders of participating policies, as they are called, with respect to whom a question of a different character arises, namely, whether or not they are to be treated as partners in the concern, and therefore disentitled, as between themselves and their co-partners on the one hand and the general creditors on the other, to be paid anything until all the general debts have first been satisfied.

The position of the general creditors appears to me quite free from doubt. The assets of the Company consist of a certain amount actually realised (it is not necessary to state the figures), and further, of all the unpaid calls, which the shareholders who engaged to pay up the amount of their shares are bound to pay, and which will produce a considerable sum if the whole can be recovered. All these assets are liable to the general creditors, who are also secured by the unlimited liability of the shareholders.

The position of the ordinary policy-holders also appears to be scarcely open to serious argument. I had copies of

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both classes of policies handed to me, and I observe that there is a remarkable difference in the wording of them. The ordinary policy, without share of profits, provides that the funds or property of the Society shall, according and subject to the provisions of the deed or deeds of settlement of the Society, be liable to pay to the representative the sum assured, with a proviso that the policy shall not entitle the assured to participate in the profits of the Society; and a proviso that the capital stock or other the funds and property of the said Society, by the provisions of the deed or deeds of settlement of the said Society applicable to the payment of moneys assured by life policies, shall alone, "subject however to all prior claims and demands thereon in pursuance of the provisions of the said deed or deeds of settlement," be liable to answer and make good all claims and demands upon the said Society in respect of the policy; and that the remedy shall be against the Society collectively and the funds of the Society, and not against the proprietors individually. And that neither the directors who sign the policy, nor any other proprietor, shall be liable further than to pay to the funds of the Society so much of his shares as shall not for the time being have been paid up.

The stress of the argument, as regards this class of policies, was laid on the clause "subject to all prior claims and demands" thereon in pursuance of the deed. If you look at the provisions of the deed of settlement, you find it part of the duty of the directors (as it must be in every concern) to pay the debts of the Society. Those debts are to be paid out of the funds of the Society; and therefore it is said, all the ordinary expenses of carrying on the concern, the repayment of money borrowed, and all other debts incurred for that purpose, are prior claims or demands upon the funds of the Society, which must be satisfied before the policy holder is entitled to be paid.

It is only necessary to look at the provisions of the deed

to see that this argument is untenable. Those provisions are very plain, clearly giving no such priority as is contended for to the working expenses of the Society. The deed expressly declares that there are to be two funds—the paid capital fund and the general fund. The paid capital fund sufficiently describes itself. Then in clause 174 we have the direction that the dividends, interest, and proceeds of the paid capital fund, and the premiums and other moneys to be received upon all assurances, endowments, indemnities, and guarantees, respectively issued, given, and granted by the Society, and the moneys to be received under grants by the Society, and all forfeitures and other profits, and the improvements and accumulations of what shall be so received, and generally all other of the moneys of the Society not belonging to or to be carried to the paid capital fund, shall be carried to another account, to be denominated the general fund; that is to say, everything except the paid capital, which is to be kept distinct, is to fall into this general fund. Then the 175th clause directs that the general fund shall be first applicable to, and shall be applied in payment of, all claims on the Society in respect of assurances of both classes, endowments, guarantees, and indemnities, and grants, and in payment of all other liabilities (which must comprise general debts), and of interest to the proprietors on their paid up capital, and of bonuses to the assured of the participating class, and also in payment of the costs and expenses of and incidental to the establishing and setting on foot the Society, including the costs of the deed, and the furnishing, and all other preliminary expenses, and also in payment of all costs and expenses of the Society, and generally of carrying on the business of the Society and incident thereto; and in case the general fund cannot with convenience be made available or productive in time to meet such payments, or shall be insufficient to meet the same, then and in such case (but not in any other case) a competent part of the paid capital fund shall be applied, to be afterwards repaid—I need read

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no further. Every sort of debt is to be paid out of this fund without any distinction or priority. All liabilities are gathered up in one sweeping clause ; and it is clear that nothing turns on the priority of the subjects named in a clause where everything is put on an equality. Indeed, if this were otherwise, it would be adverse to the claim of the shareholders, because the expense of getting up the Society and the expenses of the office are put last ; but it is clear that the order of statement has nothing to do with the order of application, the whole object of the clause being to constitute one general fund for the payment of all liabilities, including the sums due to the ordinary policy holders. On that part of the case I never entertained the least doubt.

The remaining question requires more consideration, whether or not a policy giving a right to the holder to participate in profits ought to be held to convert him into a partner in the concern, and to make him liable to the debts, or exclude him from sharing in the assets until these debts are satisfied. I am not aware that the precise point has been determined, though the authorities have gone far towards such a decision. The policy in this case is cautiously worded. Nothing is said in it about profits, except by reference to the deed ; it simply declares, that in certain events the funds and property of the Society shall accordingly, and subject to the provisions of the deed and the rules and regulations of the Society, be liable to pay the amount assured. Stopping there for a moment, it is to be observed that the clause "subject to prior claims and demands" is not found in this policy. Its absence, however, makes no substantial difference in the view I have taken of the other class of policies. Then follow the words which raise the whole question, "together with such further sum or sums, if any, as shall, pursuant to the rules and regulations of the said Society, be appropriated by way of bonus or addition to the sum hereby assured." Of

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course, the holder has notice of all the provisions in the deed as to the mode in which these bonuses are to be paid ; and it is not altogether unworthy of observation that the policy has no words suggesting a partnership in the concern, but simply points to a deed by which certain bonuses are to be paid to certain persons ; to which deed the policyholder is referred. Turning then to the deed, we see how these bonuses are to be paid. That is regulated by the 178th section. The previous section having provided that there are to be two classes of policies, one participating and the other not participating, the 178th deals with the case of the participating policies. [His Honour read the clause]. Now, observe how this division is to be made. What is to be done is this : the actuary is first to make a valuation of the surplus, which is to be submitted to the body of shareholders, the assured having no voice in the matter. The shareholders have a right to control the report of the actuary, and to direct it to be varied, or to annex any condition they think proper ; and then, when the divisible amount is fixed, a certain proportion, six-tenths, is to be set apart for bonuses. Then again, this is not made at once the property of the assured, but each is to have so much as the actuary shall think fair and equitable. Now, if that constitutes a partnership, it would be a very singular one, for it would be a partnership in which those who are supposed to be partners have no voice whatever in the management of the concern from beginning to end, no voice in the division of the profits, no power to file a bill to have an account of those profits, or any direction with regard to the distribution of them ; no right, in fact, to claim anything more than the actuary may allot to them according to his view of their respective rights. Of course, it is understood that the allotment must be bona fide, and that each is to have so much as the actuary bona fide thinks fit ; that they must take, and with that they must depart. What a singular position with regard to creditors such supposed partners

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would be placed in ! It is true, there is a sharing of the profits ; and a sharing of the profits was formerly thought to be in itself sufficient to convert a person into a partner ; but since the dicta to that effect, the subject has been ably expounded in the late case of *Cox v. Hickman*, in the House of Lords, and the doctrine reduced to its proper shape. It is very clearly put by several of the learned Judges and by each of the noble Lords who were present in the House, that it is not the correct mode of stating the question of partner or no partner, to say that a share in the profits constitutes a partnership. A share in the profits is one of the results of a partnership ; but the question of partnership is a branch of the doctrine of agency, so far as liability to third persons is concerned. If you employ A. B. to enter into a contract on your behalf, you become liable in respect of that contract, he being your agent ; and it may well be, that, in the absence of any stipulation to the contrary, you make him your agent by taking part of the profits of the adventure ; and it is on that footing that participation in profits comes to be regarded as a test of partner or no partner ; but the real test is, whether the parties who carry on the business are constituted your agents in contracting liabilities in respect of it. This exposition of the doctrine does really harmonise those cases which Lord *Eldon* found a difficulty in reconciling—those cases, I mean, where a distinction is made between a clerk taking a salary exactly proportionate to the profits, and a salary as part of the profits. Lord *Eldon* declared that that distinction was so thin, that he never could satisfy his mind of the soundness of the distinction. But, if you revert to the true principle, and if you look at what the Court did in those cases, you may trace an indication of the same doctrine, which was afterwards more clearly expounded in *Cox v. Hickman*. It was evidently felt that a clerk having no control over the business did not become a partner by receiving a salary proportioned to the profits, because there was nothing to raise the inference that he

had constituted his employers his agents in their dealings with third persons. In *Ex parte Hamper* (a), and in other cases, Lord *Eldon* took a distinction between cases where there was a right to an account of profits and those where there was no such right; and that, I apprehend, may often be a very good test. Here there is in one sense a right to an account. When the six-tenths have been ascertained and appropriated to the class of bonus policy-holders, they become a trust fund, and a Bill might be filed to secure the fund, if there were danger of its being wasted; but, until the trust is impressed upon it, the assured have not the slightest control over the affairs of the Company, nor any right to interpose in the proceedings for ascertaining the amount of the divisible profits. This is to be ascertained by the whole body of shareholders acting on the report of the actuary, and adopting it or not, as they think fit; and it is only after that is done that a trust fund is to be set apart to provide for the bonuses. The question is very like that which arose in *Cox v. Hickman*. Would a creditor, by receiving from time to time, until his debt were paid, a rateable proportion out of the net profits, become a partner? There it is to be observed, that the point arose which was pressed upon me—viz. that in a sense the capital of the creditors was embarked in the concern. The debts were part of the capital, and the concern could not have gone on had not the creditors allowed the money due to them to be employed in earning profits by the trustees acting as persons managing on behalf of the creditors. Lord Chief Baron *Pollock* puts the case thus (b):—“The question then arises, whether the interest which the creditors had in the profits to be made by the carrying on of the business under the deed was such as to make them partners in respect to third persons. In order to examine this, let me put this case: If a firm was in difficulties, and a person proposed to assist by a loan of money, engaging to receive payment out of the profits only,

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(a) 17 Ves. 403.

(b) 8 H. L. Ca. 298.

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and to make no claim in the event of there being no profits, but stipulating that one-half of the profits should be applied as they arose in payment of his debt, and that he should have power to see that this was done, would he thereby become a partner, and liable to all debts contracted subsequently to this arrangement? On this very simple state of facts, there may possibly arise a difference of opinion; but I think a large majority of all lawyers, and of all commercial men, would decide at once, that assistance so offered, and so accepted, would not make the lender of the money a partner to third persons." That puts the doctrine very strongly—more so, perhaps, than the case before the House of Lords required.

Lord *Campbell*—then Lord Chancellor—in delivering his opinion, says (a):—"Is there here such a participation in the profits of the new firm by the creditors of the old firm, as to make them partners in the new firm? They certainly are not partners *inter se*, as was properly held by the Master of the Rolls; and they could derive no profit from the new business beyond the payment of the debts due to them from the old firm. There was a formal release of those debts; but we must look at the real nature of the transaction according to the understanding of all who were parties to it. The business of Messrs. *Smith & Co.* was to be carried on by the trustees until the debts of that firm were paid, and then the business was to be transferred back to Messrs. *Smith & Co.* The Defendants can only be liable on the supposition that the person who wrote the acceptance on the bill of exchange was their agent for that purpose. I do not mean to make any distinction between their liability on the bills and their liability for the price of the goods supplied to the *Stanton* Iron Company—the consideration for the bills; but I am of opinion that the creditors of the old firm cannot be considered, by executing the deed,

as having authorised the trustees, or their agents, either to purchase the goods or accept the bills."

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Then Lord *Cranworth*, whose view in concurring in the judgment is given more at length than that of any of the other noble Lords, says (a):—"It is often said that the test or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say, that the same thing which entitles him to the one makes him liable to the other, viz. the fact that the trade has been carried on on his behalf, that is, that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made." And Lord *Cranworth* goes on to discuss the facts of that case, and holds that they did not warrant the conclusion that a partnership was constituted. Lord *Wensleydale* says the same thing, resting his opinion very strongly upon the doctrine of agency as being the true principle. He puts it thus (b), "Can we collect from the trust deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on account of himself and the rest of the creditors? I think not. It is true, by this deed the creditors will gain

(a) Id. 306.

(b) Id. 313.

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an advantage by the trustees carrying on the trade, for if it is profitable they may get their debts paid. But this is not that sharing of profits which constitutes the relation of principal, agent, and partner”

I apprehend, therefore, that the question in this case resolves itself into this—Whether the participating policy holders constituted the whole Company (it clearly could not be the directors,) their agents for the purpose of making these profits for them. It appears to me plain, that they did not. They never could have interfered with their supposed agents, or called for any account against them. They were obliged to be content with what those supposed agents thought proper to allow to them—fraud being always excluded—by which I mean, that if the shareholders had said, as to ourselves we will call one thing profit, and as to the assured we will call another thing profit, that would be a case of fraud, as to which there would be a right to interfere, but subject to that, the policy holders had no control or direction whatever.

Further, I think it is not unimportant to view the mode in which this case arises before me. The question for the general creditors is how far they can constitute these persons partners liable to them for the debts of the Company; and it is material to inquire how far the creditors can be supposed to have given credit to the policy holders as members of the partnership. You have here a joint-stock company registered under provisions with which the assured have nothing to do, and empowered to carry on the business upon registration being properly effected, with a list of members to whom, and to whom alone, unquestionably, the public, the creditors, give credit; and therefore, there being no ground for inferring an ostensible partnership, all that remains is to determine whether persons, who in fact gave no credit to these policy holders can, on the theory of dormant partnership, insist upon holding them liable on the ground of their participation in the profits. On the prin-

ciple of *Cox v. Hickman* I must hold that they cannot, and that these policy holders still remain creditors no less than the holders of ordinary policies. The two classes of assured are on the same footing.

As to the question of marshalling assets, that does not arise at this moment, for I apprehend that I cannot compel the general creditors, as contra-distinguished from assurance creditors, to wait until they have seen the result of process against those shareholders whom they may choose to sue in respect of their general liability. I must, therefore, divide the existing fund rateably among all the claimants—the general creditors and the assured of both classes—reserving sufficient to meet the annuity claim, which I understand to be the only proof tendered in respect of any current policy or liability.

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DECLARE, that the fund is divisible pro rata amongst the general creditors and the policy holders of both classes who have established their claims, without prejudice to any claim of *Miss Hunt*. Remit the matter to Chambers.

Minute.

Costs of all parties out of the fund.

Post. 338.

BIRD v. LAKE.

THIS was a motion for injunction.

In the year 1856, the Defendants, *George Lake* and *George Mills Hill*, entered into partnership together as

interlocutory application, though not at the hearing of a cause, and the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be but are not produced, and where the deponent swears that he disbelieves the statements made to him by such persons.

The rule, that no new evidence can be adduced on a motion after it has been opened, extends to the case of documents which it is proposed to verify viva voce by the attesting witness.

Where a deed contains an absolute covenant not to do an act, such covenant will not, in the absence of a Bill to rectify the deed, be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages.

May 25th.
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Evidence—
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eating-house keepers, and carried on the said business at two different houses, one No. 49 *Cheapside*, which had originally been *Lake's*, and the other, No. 13 *Gracechurch-street*, which had from the first belonged to *Hill*. In December, 1856, the partnership was dissolved; and articles of dissolution were signed by the partners, but no deed was then executed for the purpose.

By an indenture dated the 31st December, 1858, and made between *George Lake* of the one part, and *Hill* of the other part, after reciting the agreement for the dissolution, it was recited that it had been also stipulated that the deed of dissolution should contain, amongst other things, a covenant by *Lake* that he would not use any means to obtain the custom or business from *Hill*, nor carry on the trade or business of an eating-house keeper within the distance of one mile from the said house, No. 13 *Gracechurch-street*, without paying to *Hill* the sum of £1,500, as or by way of stated or liquidated damages, and that he would enter into all necessary assurances for carrying the purposes aforesaid into effect: It was witnessed, that in consideration of £15,000 then paid or secured to *Lake*, he *Lake* assigned to *Hill* all his share and interest in the premises and in the said trade or business, and in all the fixtures, fittings, and stock-in-trade on the premises, together with the goodwill of the business and all other partnership effects, for his own benefit; and thereby *Lake* covenanted with *Hill*, his executors, administrators, and assigns (amongst other things), that he *Lake* should not nor would at any time thereafter, either alone or together with or for any other person or persons, carry on or be engaged in the trade or business of an eating-house keeper, or any matter or thing whatsoever in anywise relating thereto, within the distance of one mile from the said messuage or tenement, No. 13 *Gracechurch-street* aforesaid; and that in case he *Lake* should act contrary to or in infringement of that

agreement, he would immediately thereupon pay to *Hill*, his executors or administrators, the sum of £1500 as liquidated damages.

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By another indenture of the same date *Hill* mortgaged the premises to *Lake* to secure £9000, part of the said sum of £15,000; but this sum was paid to *Lake* and a release of the mortgage executed on the 30th September, 1860.

By a memorandum of agreement, dated 11th May, 1861, *Hill* sold the house in *Cheapside* to the Plaintiffs for a sum of £10,000; and amongst the covenants contained in the assignment then executed, was one that *Hill* would not at any time, directly or indirectly, by himself or in partnership with any person whomsoever, or in any other manner, carry on or be engaged in carrying on the trade or business of an eating-house keeper, or retailer of wine or spirits or beer, or any branch thereof, within the distance of half a mile measured in a direct line from No. 49 *Cheapside* aforesaid, except as theretofore at No. 13 *Gracechurch-street*, and also, (but without prejudice to the right of obtaining an injunction against any breach of this covenant), would in case of any breach thereof pay a sum of £2500 as and for liquidated damages; and there was also a covenant, that if *Lake* should act contrary to or in infringement of the covenant contained in the said indenture of 31st December, 1858, then and in such case *Hill* would, at the request of the Plaintiffs, and at the joint expense of *Hill* and the Plaintiffs, institute and prosecute with all due despatch a suit for an injunction against *Lake* restraining him from so acting, or institute and prosecute with the like despatch on the like terms an action at law against *Lake* on the said covenant for the recovery of the sum agreed to be paid by him as aforesaid; and that if and when that sum or any other sum should be recovered from *Lake*, such sum should be apportioned between *Hill* and the Plaintiffs in equal moieties: and in case *Hill* should neglect to prosecute such

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suit or action for one week after request by the Plaintiffs to do so, then and in such case the Plaintiffs were to be at liberty to enforce the said covenant themselves, on indemnifying *Hill* against costs.

In the month of March, 1863, *Lake* agreed to purchase two houses, Nos. 66 and 67 *Cheapside* (which had been used by one *Fisher* as an eating-house, called the *Anchor*) for the sum of £1600; and he stated to his vendor as a reason why he could not give more, that, if he carried out his intention of converting the said houses into an eating-house, he should have to pay *Hill* £1500, to entitle him to carry on the business.

Immediately after the conclusion of this agreement, *Lake* entered into possession of the houses, and he caused bills to be placed on the premises, announcing that the house would shortly be re-opened as an eating-house by "*Lake*, late of No. 49 *Cheapside*, and of No. 13 *Gracechurch-street*."

It was admitted that these premises were within one mile of No. 13 *Gracechurch Street*.

Immediately after *Lake* had announced his intention of opening Nos. 66 and 67 *Cheapside* as an eating-house, the Plaintiffs objected to his doing so; and thereupon *Lake* offered to pay *Hill* the £1500 in satisfaction of his intended breach of covenant. *Hill* was willing to accept this offer; but the Plaintiffs refused to acquiesce in this arrangement, and told *Lake* that they required him specifically to perform his covenant.

Thereupon *Lake*, on the 2nd April, 1863, informed the Plaintiffs that he thought his opening the eating-house in question would not do them any harm; and that, at any rate, such eating-house was not to be opened by him, but by his nephew the Defendant *James Lake*. The Plaintiff *Bird* replied that *James Lake* had no means of carrying on the business; whereto *George Lake* replied, "Well, then, to tell you the truth, I have a young family, and must do

the best I can for them," or words to that effect. *Bird* replied that he thought *Lake* was acting very ill towards the Plaintiffs; and *Lake* then intimated that he intended to pay the £1500 in satisfaction of his covenant; and *Bird* then expressly informed *Lake* that the Plaintiffs would endeavour to enforce specific performance of the covenant, and would not accept the £1500 in lieu thereof.

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On the same 2nd April, 1863, Messrs *Van Sandau & Cumming*, the Plaintiffs' solicitors, wrote a letter to *George Lake* threatening proceedings; in reply to which Mr. *Robinson*, the solicitor for the Defendants *George* and *James Lake*, wrote a letter, dated 7th April, 1863, in which he stated that he was instructed "to say that it was not *Lake's* intention to open the house in question, or any other house as an eating-house, or otherwise to infringe his covenant."

The Plaintiffs, however, treated this answer as unsatisfactory; and in consequence of this Mr. *Robinson* (after some unimportant negotiations) wrote to *Van Sandau & Cumming* the following letter:—

"13th April, 1863.

"Dear Sirs,—I did not in my letter of the 7th instant enter into any detail, as I considered the assurance that Mr. *Lake* did not intend to infringe his covenant sufficient. The fact is, that he purchased the '*Anchor Tavern*' with an intention of fitting it up as an eating-house, and again embarking in that line of business. This accounts for the first set of hand-bills referred to in your letter. All this was done by Mr. *Lake* on the notion that he had the option of paying to your clients the stated damages of £1500, and putting an end to the covenant. On being further advised on the matter, he finds some doubt exists as to his right to do this, and he has therefore re-sold the premises purchased by him to Mr. *James Lake*, who intends

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" to fit up and open the same as an eating-house ; hence the
 " second set of bills to which you refer. My client has no
 " interest whatever in the intended business, either directly
 " or indirectly, either alone or with Mr. *James Lake*, nor
 " does he intend to be engaged with him or any one in the
 " trade or business of an eating-house keeper, or in any
 " matter or thing in any way relating thereto, within the
 " distance prescribed by his covenant.

" Yours truly,

" JAMES ROBINSON."

The Plaintiffs disbelieved the representations so made to them ; and accordingly, on the 24th April, they filed this Bill against both the *Lakes* and *Hill*. It appeared from the affidavits filed by the *Lakes* in opposition to the motion, that *George Lake* had originally intended opening the premises in question as an eating-house, under the impression that he had a right to do so on paying *Hill* £1500 ; but that, on being advised by Counsel that such was not the case, he had abandoned such intention and caused the bills which he had put up to be taken down ; and that thereupon *James Lake* had offered to purchase the premises and the stock and goodwill thereof and *George Lake's* improvements therein ; and that on the 9th April it was agreed that *James Lake* should purchase the said premises stock in trade &c., for the sum of £8000, and that such premises should be completed by *James Lake*, and that *George Lake* should pay the expense of such completion to the extent of £1500, which sum should be considered as included in the purchase-money ; and that the purchase-money should be paid by quarterly instalments ; and that immediately upon the conclusion of this agreement fresh bills had been put up, stating that the premises would be opened as an eating-house by *James Lake* : and both these Defendants denied that *George Lake* had any interest whatever in the premises, except as mortgagee thereof to secure the unpaid

instalments of the purchase-money. The Defendants were cross-examined on their affidavits ; and in the course of this cross-examination the Defendant *George Lake* refused to produce the assignment to *James Lake*, on the ground that he had not had proper notice to do so ; and he acknowledged that his nephew had no means of paying him his purchase-money, except out of the profits of the business.

In answer to this Mr. *Van Sandau* filed an affidavit, from which it appeared that he had on the 8th of May, (after the cross-examination), taken out the usual summons for production of documents ; but that he found that he could not get inspection of such documents in time for the motion ; and that he had therefore written a letter to Mr. *Robinson*, to which he had received a reply, which he produced.

He then stated, that he disbelieved the representations made by the *Lakes* as to the assignment of the premises to *James Lake* ; and that he therefore called upon one Mr. *Hyde*, from whom *James Lake* had sworn that he had borrowed £200 towards paying for this assignment, and that *Hyde* had, untruly as he believed, corroborated *Lake's* story ; and that he then saw a Mr. *Crawford* and other persons, in consequence of whose representations he was confirmed in his disbelief in the existence of any bona fide transfer of the premises or business.

The affidavit was of considerable length, and described the various steps taken by the deponent with much minute detail.

Mr. *Daniel*, Q. C., and Mr. *Bagshawe*, for the Plaintiffs, now moved for an injunction to restrain the *Lakes* from opening the said premises as an eating house, and from carrying on in any other premises within one mile from No. 13 *Gracechurch Street*, any business of an eating-house keeper, established or the capital whereof should be found by *George Lake*, or wherein or in any matter or thing

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relating to which the said *George Lake* was or should be engaged either alone or with or for *James Lake*; and also for an injunction against *George Lake* in the terms of the covenant. When the motion was first mentioned, it was proposed that it should stand over for production of the documents required, on the undertaking of the Defendants not to open the house in the interim; but the Defendants refused to give any undertaking, and it therefore became necessary to bring on the motion.

The admission of the affidavit of *Van Sandau* before-mentioned was opposed, on the ground that it was mere hearsay from persons who might have been subpoenaed to give their evidence directly.

[The VICE-CHANCELLOR—I have always understood the rule to be this—Evidence of belief is, at the Hearing of the cause, of no value whatever; but on an interlocutory application it is always admitted as putting the other side to answer it, and if not expressly denied is to be assumed, for the purposes of the application, to be in accordance with the facts.]

Mr. *Giffard*, Q. C., and Mr. *Napier Higgins*, for *James Lake*.—We are no party to the covenant, and no relief can be had against us. The allegations made against us are all disproved. The only question is, whether *George Lake's* interest as mortgagee of these premises is sufficient to make the carrying on of the business by us an infringement of the covenant; but that cannot be so, as the very same covenant is contained in *Hill's* assignment to the Plaintiffs, and yet *Hill* was permitted to remain as mortgagee of the premises. There is therefore no breach of covenant proved, and no case for injunction.

Mr. *Rudall* (Sir *Hugh Cairns*, Q. C., with him) for the Defendant *George Lake*, proposed to give in evidence

the agreement of December, 1856, between *Hill* and *George Lake*, and the assignment from *George Lake* to *James Lake*; and for that purpose to call the attesting witnesses and prove the documents viva voce as at the Hearing of the cause.

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[The VICE-CHANCELLOR.—You have yourself forced on this motion by refusing the undertaking; and that being so, you cannot complain that you are unprepared. The rule as to motions is, that no new evidence can be offered after the motion is opened; and I cannot therefore admit these documents now.]

Mr. *Rudall*.—At any rate, the Defendants have sworn to the fact of a complete *bonâ fide* assignment, and we tender the deeds themselves as evidence in corroboration of the affidavits. But, moreover, the recitals in the deed, as they appear on the face of the Bill, show that what was intended was that *Lake* might if he pleased open such a house as this, on paying £1500 for the privilege; and that sum having been tendered before motion, the motion ought to be refused.

Mr. *E. K. Karslake*, for the Defendant *Hill*, took no part in the argument.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think an injunction must issue, to restrain *George Lake* till the Hearing or further order in the words of the covenant; and to restrain *James Lake* in similar terms from carrying on such business as partner of *George Lake* or otherwise on his behalf, so long as *George Lake* has any interest in the profits of such business. I do not feel myself at liberty to restrain *James Lake*, if he has *bonâ fide* purchased this business for himself.

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I wish to say one word with regard to Mr. *Van Sandau's* affidavit. This Court is constantly in the habit, on interlocutory applications, of allowing statements as to belief;—of course, at the Hearing of the cause, evidence of hearsay would be inadmissible, and evidence simply of belief would be in general perfectly valueless:—but on interlocutory applications the practice is for one side to swear to their belief, and then their opponents are put to answering the affidavits; in such a case the facts so sworn to are not proved, but, if not denied by the other side, are assumed to be true for the purposes of that application.

Then the 23rd General Order of the 5th of February, 1861, requires every affidavit to show on the face of it the means of knowledge of the deponent, (of course this does not alter the rule of the Court as to admissibility of evidence).

Then, putting these two things together, when a statement is made merely on belief, it seems to be proper to state the grounds of the deponent's belief, so as to show that he has some reasonable and probable cause for making the statement, and that he has not sworn merely to raise an issue; and the hearsay evidence in question in this case seems properly introduced as a ground of belief, though not in itself evidence of any fact.

I think this particular affidavit might have been a great deal better framed. It is very loose and unnecessarily prolix, and Mr. *Van Sandau* in some parts takes it upon him to swear to what is the practice of this Court; but the main facts appear to stand thus:—

George Lake sold to *Hill* a very valuable business, carried on in two different houses, one in *Gracechurch Street* the other in *Cheapside*; and on the occasion of the sale he entered into the covenant in question, which was

clearly intended to include both houses, which are within one mile of one another. *George Lake* appears to have mistaken the effect of the covenant; and upon the recitals of the deeds there certainly is some ground for saying that the parties were looking to something other than an absolute covenant; it might well be that *George Lake* believed that he could escape from the force of this covenant by paying £1500; but that is not so: and I do not think that I can on this Bill control the covenant by any presumption arising out of the recital, at least so far as that recital appears in the Bill—(I have already given my reason for refusing further evidence as to this)—and I think I give this gentleman the fullest advantage to which he is entitled, when I say that I quite believe that he was acting *bonâ fide* when he bought his present house and tendered the £1500 to the Plaintiffs and *Hill*. He paid large sums of money on the faith of his being able in this manner to get rid of the covenant; and *Hill* was willing to accept the £1500, or his share of it, and let him go on; but the Plaintiffs refused the tender, and determined to stand upon the covenant. He then took a course, which, if *bonâ fide* completed before Bill filed, would have entitled him to say, “The case is very different from that raised by the Bill; I am doing nothing, and have no power to hinder the act you complain of.” That would have been the case if the transfer had been *bonâ fide* concluded before Bill filed; but upon the facts it appears that he had not really parted with his interest until after the institution of the suit, and this would in itself entitle the Plaintiffs to an injunction. It appears that no instrument which would have the effect of depriving *George Lake* of his interest in this business was executed till four days after the filing of the Bill. Then, has the right of the Plaintiffs to insist upon an injunction been displaced by anything that has occurred since the filing of the Bill? I think not. I should not have parted with this case without much further inquiry,

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even on the supposition that it entirely rested on the evidence of *George Lake* and his assignee. *George Lake* says :—" I have a young family, and I must do my best for them." How does he do that by buying a house and selling it again immediately afterwards? He clearly in the first place wants the business for himself; then, finding that he cannot carry out that intention, he goes to *James Lake*, who has no capital, and no means of paying any money except out of the profits of the business. Then his solicitor writes a letter, in which he says that *George Lake* has no interest in the concern; whereas in truth nothing which could affect his interest had then been done, and nothing was done until the parties were put under the pressure of this suit. Then, again, they refused to produce this deed of assignment when it was asked for; and though they now endeavour to use that deed for their own purposes, I have been obliged to hold it inadmissible. In this state of things the Plaintiffs offered to allow the motion to stand over on the ordinary undertaking; but the Defendants, no doubt under proper advice, refused to give any undertaking, and therefore, the motion was forced on, and I am obliged to dispose of the question. The refusal of such an undertaking always gives rise to grave suspicion in my mind; for the undertaking prejudices nothing, and I can see no ground for such refusal, unless there be something behindhand. I have the strongest possible suspicion that there never has been any such total assignment as is necessary to support the case of *James Lake*. Can he have paid £2000 merely for the goodwill of the *Anchor*? I do not think that *George Lake* has parted with this property without retaining some hold on the profits. I must, therefore, grant the injunction, but it must be in the limited form which I have pointed out. It will have the disadvantage of raising the whole question at issue in the cause on motion for committal; but that cannot be avoided: it will be for *James Lake* to see that he keeps within the terms of the injunction.

SMITH v. LEVEAUX.

Rescinded 2. 28. 3. 1861.

THIS was a Bill for an account. The Defendants were wine-merchants, who carried on business at *Liverpool* for "The *Hungarian Vineyard Company*," under the name of "*Leveaux & Co.*"

The Defendants, being desirous of introducing *Hungarian* wines and spirits into the wine trade in *England*, made an arrangement with the Plaintiff to travel for them over a considerable district in *England*. This arrangement was stated in the Bill to be on the terms that the Plaintiff should receive a commission of $7\frac{1}{2}$ per cent. upon all orders obtained by him through his connection (and executed by the Defendants) for the wines and spirits sold by them to any of the Plaintiff's connections or through his introduction.

It appeared from the evidence, however, that this statement was not quite accurate, and that the original proposition on the part of the Plaintiff had been that he was to receive 10 per cent.; but that on the 14th of January, 1860, the Defendant *Edward Leveaux* had written him a letter, in which he explained that they could not pay so heavy a commission, and offered him $7\frac{1}{2}$ per cent. It further appeared, that in an account which the Plaintiff had sent in in the month of July, 1860, but which the Defendants declared they had never seen, the Plaintiff had charged commission at the rate of 10 per cent. up to 1st January, 1860, and at the rate of $7\frac{1}{2}$ per cent. for the rest of the time, and it appeared by such account that the sum of £227 : 5 : 10 was then due to the Plaintiff for commission calculated as aforesaid. In the said letter were also inclosed two bills of exchange for acceptance by the Defendants, in liquidation of the said amount.

1863.

*May 8th,
June 2nd, 3rd.
Account.*

The rule that a bill for an account will not lie at the suit of an agent against his principal except in cases of mutual accounts or great complication, does not extend to a case where there have been receipts by the principal, of the particulars whereof the agent is ignorant, on which a commission is payable to the latter.

Semble, a Plaintiff will not in general be allowed to obtain a higher commission than he has claimed by his bill, even where leave to amend for the purpose of claiming the higher commission has been refused.

494 217.

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In reply to the last-mentioned letter, the Defendant *Edward Leveaux* wrote to the Plaintiff a letter which formed the basis of the contract in question in the suit. Such letter was (so far as material) as follows :—

“ *Carlou*, July 23, 1860.

“ Dear Sir,—In reply to yours of the 19th July, which
 “ has been forwarded to me here, I beg to say I cannot
 “ arrange for the acceptance of the bills there named, as
 “ drawn at three and four months, until I know the state
 “ of your commission balance due, as I fancy when the
 “ goods are allowed for that are marked down as arranged
 “ by yourself to your account the balance will be very
 “ much less than the sum named in your favour as above,
 “ as there have been several countermanded and orders
 “ refused that I think you do not include in your state-
 “ ment. However, on my return, this will be quickly
 “ adjusted. As regards the towns lately traced out for
 “ your canvass, I beg to say, in submitting that list of
 “ places easily worked from *London*, I quite thought that
 “ it would be the ground most likely to suit your views of
 “ a head-quarters in town ; and if I remember correctly,
 “ there were several large places that were amongst those
 “ towns marked before by yourself for our joint business,
 “ and several that had been already worked, such as *Bir-*
 “ *mingham*, *Leamington*, *Cheltenham*, *Gloucester*, and
 “ *Brighton* ; and I again say that I have no doubt, if you
 “ carry out your *London* plan of head-quarters, that district
 “ will be the most valuable for you to work.

“ Now, as regards the commission, I am most anxious
 “ that it should be as remunerative as possible with the
 “ successful working out of the business. To keep at our
 “ present prices in brandy, port, sherry, &c., I find it will
 “ not suit to allow a higher commission than the following ;
 “ and particularly as I have had to give up a highly pro-
 “ fitable portion of our business, so that I might have time

" to travel entirely in the *Hungarian* wine trade. On all
 " business done by yourself, either in *London* or your
 " district, $7\frac{1}{2}$ per cent. where our full prices and ship-
 " ping arrangements are adhered to, and, of course,
 " only on good debts, and an allowance of $3\frac{1}{2}$ per
 " cent. on all orders received from your friends first in-
 " troduced by you, so long as you continue to exert
 " yourself in the working out of the business, and are
 " engaged in the selling of our *Hungarian* wines and
 " spirits; but of course we could not bind ourselves in
 " perpetuity to such an allowance, as you might cease to
 " represent these interests, and then, of course, the allow-
 " ance would cease at the same time. Such a contingency
 " I hope, however, is not likely to occur."

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In reply to the last-mentioned letter, the Plaintiff, on
 the 1st of August, 1860, wrote to the Defendants assenting
 to the terms as to commission contained in such letter;
 and on the 3rd of the same month he again sent them two
 bills for acceptance for £113:12:11 each, making to-
 gether the said sum of £227:5:10; one of which bills was
 afterwards accepted by the Defendants, and paid.

The Bill then stated that the Plaintiff, not being satisfied
 with the extent of the districts to which his agency for the
 Defendants had been limited, required that the same should
 be extended; and on that being refused, wrote and sent to
 the Defendants a letter dated 27th August, 1860, declining
 their agency as from that day; that thereupon the Defen-
 dant *Edward Leveaux* had an interview with him at
Hull, as the result whereof it was agreed that the Plaintiff
 should continue his agency, and that upon all orders for
 wines and spirits obtained by the Plaintiff within his dis-
 trict which were executed by the Defendants, the Plaintiff
 should receive a commission of $7\frac{1}{2}$ per cent., and that he
 should continue to receive $3\frac{1}{2}$ per cent. commission upon
 other orders from his connection not within such district.

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The answer substantially admitted the truth of these statements, save that the Defendants asserted that, in accepting the bill of exchange in question, they did not intend to admit the accuracy of the Plaintiff's demand, but that such bill was merely accepted as a favour to the Plaintiff, and by way of payment on account; and that what had been really agreed to at the *Hull* meeting was, that the Plaintiff was to have a district of seventy towns, chiefly round *London*, and was to receive $7\frac{1}{2}$ per cent. upon the invoice prices of all orders taken there by him personally, but not any commission upon orders not taken by him personally, nor upon orders out of his district, although sent by persons originally introduced by him; and that in other respects the terms were to be the same as those of the original agreement, as modified by the said letter of the 23rd July, 1860; and, "save as aforesaid," they traversed the Plaintiff's account of the agreement come to at that meeting.

Further disputes having arisen, the Plaintiff, in the month of September, 1861, ceased to travel for the Defendants; and on the 14th of January, 1862, filed this Bill for an account and payment of what was due to him from the Defendants.

The Answer contained the following charge: "We submit that this Bill should not have been filed, and that the Plaintiff's remedy, if any, is by action at law."

The evidence was very voluminous, consisting in great part of the correspondence between the parties, besides which the Plaintiff had been examined upon a concise statement, and all the parties had been cross-examined, but nothing material was elicited, save as above stated.

Argument.
—

Mr. Willcock, Q.C., and Mr. Roxburgh, for the Plaintiff:—

Upon the facts of this case it is clear that the Plaintiff

is entitled to an account; and the only question is as to its form and extent. The acceptance and payment of the bill for £113 : 12 : 11 shows that the account sent in in August, 1860, was treated as a settled account, for no one ever heard of a bill for an odd sum of money being drawn on account.

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If that account is to be opened, then we are entitled to have our commission calculated at 10 per cent. for the year 1859, and at 7½ per cent. for the rest of the time during which the agency lasted. Finally, we are entitled to 3½ per cent. on all orders received from persons whom we introduced, and to an account of these orders: this account could not have been had at law.

Mr. Jessell for the Defendants :—

Unless your Honour is prepared to reverse everything that has been done, you cannot sustain this Bill.

There are but three cases in which a Bill will lie for an account of this nature :

1. By principal against agent, on account of the trust reposed in him ;
2. Where there are cross accounts, each party having both received and paid moneys on account of the other ;
3. In exceptional cases of great complexity, like that of *The Taff Vale Company v. Nixon* (a).

No other case has been recognised.

It is not sufficient that there should be entries on both sides of the account: *Padwick v. Hurst* (b) ; nor even that the Bill should charge great complication in the accounts, if it appears that there is (as here) but one accounting party: *Padwick v. Stanley* (c), where Vice-Chancellor *Turner* allowed a general demurrer to such a Bill in spite of a charge much stronger than anything which appears here.

(a) 1 H. L. Cas. 111. (b) 18 Beav. 575. (c) 9 Hare, 628.

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[He also referred to *Phillips v. Phillips* (a), *Dinwiddie v. Bailey* (b), *North Eastern Railway Company v. Marten* (c), *Foley v. Hill* (d), *Fluker v. Taylor* (e).]

It is immaterial that we have to account for the $3\frac{1}{2}$ per cent. received on orders from the Plaintiff's introduction (if indeed on the true construction of the agreement we have to do so), as at most that could only entitle the Plaintiff to file a bill of discovery, or exhibit interrogatories for our examination in an action for not accounting; it cannot give this Court a jurisdiction, which it had not otherwise, to entertain such a Bill.

On the facts we dispute:—

1st. That the Plaintiff ever was entitled to 10 per cent.;

2ndly. The times at which the $3\frac{1}{2}$ per cent. commission was to begin and end;

3rdly. The persons in respect of whose orders it was to be paid.

[The VICE-CHANCELLOR.—I do not see how the Plaintiff can possibly get 10 per cent., when his Bill expressly says the agreement was for $7\frac{1}{2}$ only.]

Mr. Willcock, Q.C., in reply.—The Bill is in error on that point; it was prepared from the instructions given by a clerk in the Plaintiff's absence, and the error was not discovered till the answer to the concise statement had been filed; leave to amend was then applied for, but refused as coming too late. On the evidence the matter of fact is clear, and the letter of 14th January, 1860, which seems at first sight to controvert it, is mere argument, and virtually admits it.

(a) 9 Hare 471.

(b) 6 Ves. 136.

(c) 2 Phil. 759.

(d) 2 H. L. Cas. 28.

(e) 3 Dr. 182.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

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—
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I do not think that under the circumstances I can assume that there was a concluded agreement to pay this 10 per cent. commission; the Bill only says 7½ per cent.; and I must take it that the Bill was filed after deliberation and with full knowledge on the Plaintiff's part of a circumstance which must have been present to his mind. I think I am going a great way in his favour when I allow him an inquiry about this 10 per cent.: not only he does not claim it by his Bill, but on the construction of the letter of 14th January, 1860, which has been relied on, my impression would be, that they had originally agreed to 7½ per cent., but that afterwards, on pressure by the Plaintiff, they had consented to raise it to 10 per cent. The Bill is silent as to this, and the Defendant says in effect, "I gave way to your pressure, but I cannot go on with the new arrangement;" and a question may arise whether the Plaintiff has not acquiesced in that view, and consented to take 7½ per cent. *ab initio*.

[His Honour then discussed the evidence, on which he determined, that an inquiry should be directed, whether, anterior to the year 1860, there had been any agreement that the commission should be 10 per cent., and if so, whether that agreement had been in any and what manner waived.]

I am anxious to give my reason for not acceding to Mr. *Jessel's* view on the question of law: I should be most unwilling to do anything which would have the appearance or effect of throwing any doubt upon the decisions in *Dunwiddie v. Bailey* or *Phillips v. Phillips*, that where the receipts and payments are wholly on one side, this Court will not take the account at the suit of an agent: but this is a very different case from that; the Defendants

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have agreed that for everything they sold to any person on the Plaintiff's introduction, not on his order, they would pay him $3\frac{1}{2}$ per cent. ; the Plaintiff cannot possibly know anything about those orders, and therefore the Defendants must account for that commission, and for that purpose they are properly brought here ; but for that, I should have been of opinion that there was no case sufficient to sustain the Bill.

Direct an account of what is due to the Plaintiff for commission on all orders for wines and brandies obtained by him or through his introduction, leaving the account open, and not treating the account sent in July, 1860, as a settled account ; then direct the inquiry before mentioned, and an inquiry what the Plaintiff's district was ; and reserve further consideration and costs.

1 Law Rep: 69:87-606-

Feb. 27th,
June 4th.
Railway Com-
pany—Agree-
ment—Ultra
Vires.

Where an
agreement
made between
two Railway
Companies
under their
common seals

MAUNSELL v. MIDLAND GREAT WESTERN (IRE- LAND) RAILWAY COMPANY.

THIS was a Bill by certain shareholders in the *Midland Great Western (Ireland)* Railway Company, on behalf of themselves and all other the shareholders in the Company, against the Company and the directors thereof (other

contains clauses which are beyond the powers of the directors of one of the Companies, and clauses for referring to arbitration all disputes arising under the agreement, this Court will, at the suit of a shareholder of that Company, restrain both Companies from proceeding to arbitration in respect of alleged breaches of those clauses.

But no such injunction will be granted at the suit of a shareholder of the other Company, on the ground that the stipulations of any such clause are beyond the powers of the directors of the Company in which the Plaintiff is not a shareholder.

An agreement by a Railway Company to contribute towards the parliamentary deposit required for bills promoted by another Company is ultra vires.

So also is an agreement to take shares in future extensions of another Company.

So also an agreement to make traffic regulations applicable to future extensions.

But no such agreement is ultra vires if its validity is expressly made to depend on the sanction of Parliament.

than the Plaintiff *Maunsell*) and the *Great Northern and Western (Ireland)* Railway Company, praying for an injunction to restrain the Defendants from acting on the agreement mentioned in the Bill, so far as regarded the clauses therein specified, and in particular from proceeding with the reference hereinafter mentioned, and from in any other way proceeding upon or acting under the notice of the 13th January, 1863, hereinafter set forth.

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The material circumstances were as follows :—

The *Midland Great Western (Ireland)* Railway Company (hereinafter called the *Midland Company*) were incorporated by Act of Parliament in 1845, for the purpose of making a railway, which, on the 1st August, 1859, extended from *Dublin* through *Athlone* to *Galway*.

The Plaintiffs were shareholders in this Company, holding shares to the value of £37,000, or thereabouts.

The *Great Northern and Western (Ireland)* Railway Company (hereinafter called the *North Western Company*) were incorporated by Act of Parliament in 1857, for the purpose of making a railway commencing by a junction with the *Midland* Railway at *Athlone*, and terminating at *Roscommon*, and another railway thence to *Castlereagh*, to be called "The *Great Northern and Western (Ireland)* Railway."

Other Acts of Parliament were subsequently passed, empowering the said *North Western Company* to make other railways in extension of and in connection with the said *North Western Company*. One of these Acts was passed in 1858, and authorised certain deviations; another was passed in 1859, and authorised an extension of the railway to *Castlebar*; another in 1860, authorising certain deviations; another in 1861, authorising an extension to

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Westport; and finally, another in 1862, authorising an extension to *Ballina*. The Acts of 1859, 1861, and 1862 are hereinafter referred to as the *Castlebar*, *Westport*, and *Ballina* Extension Acts, respectively.

By the 46th section of the Act of 1857, it is enacted, that it should be lawful for the *North Western* Company and the *Midland* Company from time to time to enter into and make such contracts and agreements as should be deemed expedient by and between the said Companies, for and with reference to the working of the traffic upon the railway by that Act authorised, or any part thereof, with the engines and carriages of the *Midland* Company, and for the interchange and forwarding of traffic passing to and from the railway of the Companies, or either of them, from or to the railway of the other of them; and also with reference to the rates, tolls, or charges to be charged by or between the said Companies for or in respect of any traffic, and the division and apportionment between the said Companies of such rates, tolls, and charges; and such contracts and agreements from time to time to alter and vary as occasion might require; and also, for all or any of the purposes aforesaid, to make and execute all such deeds, contracts, instruments, and assurances as might be deemed requisite or expedient for giving to the matters and premises aforesaid full effect.

And by section 47 it was enacted, that, during the continuance of any such traffic arrangements, the railways of the two Companies should, for the purpose of calculating the tolls payable thereon, be deemed one continuous line of railway.

And by section 48 it was enacted, that no such agreement as aforesaid should be for more than ten years, and no such agreement should have any operation until the same should have been approved of by the Board of Trade; and that no such agreement should in any manner alter, affect,

increase, or diminish any of the rates, tolls, or charges which the said Companies should for the time being be respectively authorised and entitled to demand and receive from any person or any other Company; and that all other persons and Companies should, notwithstanding any such agreement, be entitled to the use and benefit of the railways to which the said agreement might relate, upon the same terms and conditions, and on payment of the same tolls, rates, and charges as they would have been in case no such agreement had been entered into; and it was thereby provided that the Board of Trade should not approve any such agreement without being satisfied that the same had been duly assented to by shareholders of the Companies respectively in special meetings assembled for that purpose, and holding at least three-fifths of the paid-up capital of the Companies represented at such meetings respectively, personally or by proxy, such shareholders being qualified to vote thereat in right of such capital.

And section 49 provided for the renewal of the said agreement in such manner as therein mentioned.

By the 13th and certain following clauses of the *North Western Railway Act of 1858* the *Midland Company* were authorised to become shareholders in the *North Western Company* to any extent not exceeding £80,000 (being one-third of the then authorised capital of the *North Western Company*), and to appoint one-third of the directors of the last-mentioned Company.

And by the 21st clause of this Act it was enacted, that the agreements sanctioned by clause 46 of the Act of 1857 might comprise (amongst other things):—

The user and working by the *Midland Company* of all or any part of the railways of the *North Western Company*, and the works and conveniences belonging thereto.

The conveyance by the *Midland Company* of all or any part of the traffic upon these railways.

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The division and apportionment between the two Companies of all or any part of the gross or net receipts from the traffic upon their respective railways.

The forwarding, interchange, and transmission upon the respective railways of the two Companies of any traffic.

The collection, reception, accommodation, delivery, and general conduct of any such traffic.

By the 22nd section of this Act power was given to the two Companies to appoint a joint committee of directors for carrying any such traffic arrangement into effect.

And by section 23 it was enacted that such contracts might be entered into for such period as the two Companies should think fit; provided that if at the end of ten years after the date of any such contract or agreement, or after the time of any revision thereof under that provision, the Board of Trade should think that any of the terms and conditions thereof injuriously affected public interests, they might require the two Companies to revise the contract or agreement accordingly.

In pursuance of the powers given them by the said Act, the *Midland* Company duly took up one-third of the then authorised shares of the *North Western* Company.

On the 1st of August, 1859, an agreement was come to by the directors of the two Companies, and sealed in duplicate with the common seals of both Companies; by which, after reciting various mutual oppositions in Parliament, and that such oppositions had been compromised, and that the arrangement for compromise had been up to that time duly carried out, a number of provisions for the purpose of settling the through traffic and for other purposes were agreed to by and on behalf of both Companies.

The material clauses of this agreement were the following:—

"Article 1. *John Hawkshaw*, of *Great George-street, Westminster*, civil engineer, or if he dies or becomes incapacitated, or if and when he declines or by reason of absence is unable to act, a competent and impartial civil engineer to be from time to time named by the respective engineers of the two Companies, or if and when they do not agree thereon, then a competent and impartial civil engineer to be, on the application of the two Companies or either of them, named by the Board of Trade, shall be the referee for the purpose of these presents, and is hereinafter referred to as the referee.

"Article 44. At any time or times before Midsummer 1862, the *North Western Company* may apply to Parliament for an Act to authorise them to extend their now authorised line of railway to *Boyle, Castlebar, Westport, and Ballina* respectively, or to any of those places, and to authorise them to raise the additional capital requisite for that purpose, and to authorise the *Midland Company* to contribute one-third of such additional capital, and to raise additional capital of the *Midland Company* for that purpose, and, according to Article 46, to nominate additional directors of the *North Western Company*.

"Article 45. The *Midland Company* will concur in and use their utmost reasonable endeavours to insure the success of any or every application to Parliament made according to Article 44, and in order thereto will, in any or every such case, provide the subscription contract, if any, to the extent of one-third of the requisite amount, and make the deposit of one-third of the money, if any, respectively required by Parliament with reference to the application.

"Article 46. If the *North Western Company* succeed before the end of the year 1862 in obtaining from Parliament authority to make these extensions, or any of

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them, and authority for the *Midland* Company to contribute towards the additional capital of the *North Western* Company to be raised for that purpose, then, if the number of the directors of the *North Western* Company be increased above nine, being the number prescribed by the *North Western* Company's Act of 1858, the *Midland* Company shall, in respect of their contribution towards that additional capital, be entitled to nominate one-third of the additional number of directors of the *North Western* Company.

"Article 47. If the *North Western* Company succeed before the end of the year 1862 in obtaining from Parliament authority to make these extensions, or any of them, then the several terms and conditions of Articles 1 to 43, both inclusive, except Articles 33 and 34, shall apply to and in respect of every such extension in like manner as they apply to and in respect of the *North Western* Company's now-authorised railway, and shall accordingly, from time to time, be read and have effect in like manner as if they were repeated in these presents with reference to every such extension, and in every case with the modifications thereof requisite for making them applicable to the respective extension; and the payments to be made by the *North Western* Company to the *Midland* Company in respect of the matters expressed in Articles 33 and 34, and for the purposes as regards the respective extension of these Articles, shall be agreed on between the two Companies, or, failing agreement between them, shall be determined by the referee, who may award whatever payments he thinks proper.

"Article 48. If and whenever any difference shall arise between the two Companies as to the construction, intent, effect, incidents, consequences, performance, or observance of any of these articles, or as to any breach or alleged breach

thereof, or as to any claim in respect of any such breach or alleged breach, or as to the mode in which any such breach or the consequences thereof shall be obviated or compensated for, or otherwise touching the premises, every such difference shall be referred to and determined by arbitration, according to the provisions 'With respect to the settlement of disputes by arbitration' of the Companies Clauses Consolidation Act, 1845; and both Companies shall be deemed to have concurred in the appointment of the referee, who shall be the single arbitrator accordingly.

"Article 49. Each of the two Companies will in good faith use their respective utmost reasonable endeavours that full effect shall be given to these presents, according to the true intent thereof; but if and whensoever it shall be awarded by the referee, that either of the two Companies has wilfully failed in that behalf, the other Company shall have the option of declining to fulfil their part of this agreement."

This agreement was sanctioned by the Board of Trade.

The *Castlebar* Extension Act received the Royal Assent on the same 1st of August, 1859, and contained provisions authorising the *Midland* Company to subscribe one-third of the requisite additional capital, and extending the enactments of the Acts of 1857 and 1858, as to traffic arrangements, to the line of railway by that Act authorised to be constructed.

The *Westport* Extension Act (passed in 1861) contained similar provisions with respect to the railway thereby authorised. That Act also expressly recited the agreement on the part of the *Midland* Company to subscribe one-third of the new capital of the *North Western* Company.

The *Midland* Company duly subscribed one-third of the additional capital authorised by the *Castlebar* Extension

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Act, but did not subscribe any of the additional capital authorised by the *Westport Extension Act*.

In the year 1862, the bill for the *Ballina Extension* was introduced into the House of Lords, and such bill, as introduced, contained clauses similar to those of the former Extension Acts hereinbefore mentioned. At the "*Wharncliffe meeting*" (a) of the *Midland Company*, however, this Bill was disapproved of, in consequence of which the clauses empowering the *Midland Company* to subscribe additional capital were struck out.

(a) This meeting is so called because summoned in obedience to the Standing Order which was originally adopted by the House of Lords upon the motion of Lord *Wharncliffe*, and which is hence commonly known as "*The Wharncliffe Order*."

This Order is as follows :

"That no bill which shall have been brought from the House of Commons to empower any Company already constituted by Act of Parliament to execute, undertake, or contribute towards any work other than that for which it was originally established, or to sell or lease their undertaking or any part thereof, or to amalgamate the same or any part thereof with any other undertaking, or to abandon their undertaking or any part thereof, or to dissolve the said Company, shall be allowed to proceed, unless the Examiners shall have reported—

1st, That the bill as proposed to be introduced into this House was submitted to a meeting of the proprietors of such Company, at a meeting held specially for that purpose.

2nd, That such meeting was called by advertisement inserted for two consecutive weeks in a morning newspaper, published in London, Edinburgh, or Dublin, as the case may be, and in a newspaper of the county or counties in which the principal office or offices of the Company is or are situate; and also by a circular addressed to each proprietor at his last known or usual address, and sent by post or delivered at such address not less than ten days before the holding of such meeting, enclosing a blank form of proxy, with proper instructions for the use of the same; and the same form of proxy and the same instructions, and none other, shall be sent to every such proprietor; but no such form of proxy shall be stamped, nor shall the funds of the Company be used for the stamping any proxies, except the Company shall, at a general meeting, determine otherwise, in which case a stamped proxy shall be sent to each proprietor with such instructions as aforesaid.

In order to pass the Standing Orders of the House of Commons, it was necessary that "*Wharnccliffe* meetings" of both Companies should be holden. At that of the *Midland* Company the bill was unanimously disapproved; and at that of the *North Western* Company the *Midland* Company attended as shareholders and opposed the bill, and thereby prevented the *North Western* Company from obtaining the requisite consent.

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Under these circumstances, the *North Western* Company applied to the Committee on Standing Orders to dispense

3rd, That such meeting was held at a period not earlier than seven days after the last insertion of such advertisement.

4th, That at such meeting the said bill was submitted to the proprietors aforesaid then present, and was approved of by proprietors present in person or by proxy, holding at least three-fourths of the paid-up capital of the Company represented at such meeting, such proprietors being qualified to vote at the meeting in right of such capital."—
L. S. O. clxxxv. 1.

This Order was afterwards adopted by the House of Commons, and appears among their Standing Orders as follows:—
"That every bill to empower any Company already constituted by Act of Parliament to execute, undertake, or contribute towards any work other than that for which it was originally established, or to sell or lease their undertaking or any part thereof, or to amalgamate the same or any part thereof with any other undertaking, or to abandon their undertaking or any part thereof, or to dissolve the said Company, brought from the House of Lords, shall, after the first reading thereof, be referred to the Examiners of Petitions, who shall report as to compliance or non-compliance with the following Order."

[1. 2. 3. 4.—Exactly similar to the clauses in the Order of the House of Lords.]

"In case any proprietor shall, by himself or any person authorised to act for him in that behalf, have dissented at any meeting called in pursuance of the last-preceding Standing Order, such proprietor shall be permitted to be heard by the Examiners of Petitions on the compliance with such Standing Order, by himself his agents and witnesses, on a memorial addressed to the Examiners, or by the committee on the proposed bill, by himself his counsel or agents and witnesses, on a petition presented to the House, such memorial or petition having been duly deposited in the Private Bill Office."—
C. S. O. 162, 163.

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with the "*Wharnccliffe Order*" in their case; but this was refused. Thereupon the *North Western Company*, on the 27th June, 1862, served the *Midland Company* with a requisition under their common seal, requiring them to attend Mr. *Hawkshaw* on a reference as for breach of the agreement of 1859; and indorsed thereon was a copy of a paper signed by Mr. *Hawkshaw*, appointing Tuesday, July 1st, for the reference. On the said 1st July, the agents of the *Midland Company* appeared and asked for an adjournment, to consult their directors, who were in *Ireland*; and an adjournment was granted till the following morning, and a further adjournment refused.

On the next day, Mr. *Hawkshaw* proceeded to hear the reference, and awarded, "that, as regards the said bill," (the *Ballina Extension Bill*), "the *Midland Company* ought, under their agreement, to have concurred in and used their utmost reasonable endeavours to ensure the success of the application to Parliament for such bill, and that they had failed to do so, and had opposed the same; and that they had not proved to or before him, or suggested as capable of proof, anything which would amount to a justification of that course of proceeding on their part." And he further awarded that the *Midland Company* should pay £31 10s. 0d., his charges for the arbitration.

In consequence of this award, the House of Commons suspended their Standing Orders, and the bill passed into an Act, and, as passed, contained a clause extending to the new line the provisions of the Acts of 1857 and 1858 as to traffic arrangements; but such Act did not contain any clause authorising the *Midland Company* to subscribe to the new undertaking.

On the 14th of January, 1863, the *North Western Company* served the *Midland Company* with a notice reciting the agreement, and then proceeding in the following terms:—"Now we the *North Western Company*

hereby give you notice, that we complain that you have, in various ways and on various occasions, broken the said agreement, and more particularly in the several matters and instances following, that is to say :—

1st. “That whereas we the *North Western* Company in the session of Parliament held in the year 1859 applied to Parliament for an Act authorising the extension of our line to *Castlebar*, and you the *Midland* Company were requested by us, in accordance with the said agreement, to provide one-third of the parliamentary deposit required for such Act, you refused and neglected so to do.

2nd. “That whereas we, in the session of 1861, applied to Parliament for an Act empowering us to extend our then authorised line to *Westport*, and you were requested to provide one-third of the deposit for that Act, you refused and neglected so to do.

3rd. “That when it became requisite, on the prosecution of the last-mentioned application, to hold a *Wharnccliffe* meeting of your shareholders, for considering and if approved sanctioning the bill, you refused and neglected to hold such meeting.

4th. “That at the *Wharnccliffe* meeting of the shareholders of us the *North Western* Company, called and held for the like purpose, you, as shareholders of the *North Western* Company, gave your votes against the bill.

5th. “That when we the *North Western* Company applied in that same session to the Standing Orders Committee of the House of Lords for a dispensation from the Standing Orders, so that the bill might nevertheless be proceeded with, you opposed that application.

6th. “That after the last-mentioned bill was passed into an Act, and you were thereby authorised to subscribe for and take shares to the extent of one-third of the capital

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to be raised for the purposes of that Act, yet you have hitherto refused to subscribe or take shares in that capital.

7th. "That whereas we gave you notice, that in the session of the year 1862 we intended to apply to Parliament and deposit a bill for a further extension of our then authorised line to *Ballina*, and it became necessary, in accordance with a Standing Order of Parliament, that you should consent to the subscription which, in accordance with the said agreement, it was provided by the bill you should be authorised to make towards the capital to be raised for that extension, you refused to give such consent ; and that whereas we made such application to Parliament and deposited such bill, and gave you notice thereof, you refused to provide one-third of the deposit required for the purpose of that Act.

8th. "That, in the same session, you opposed the application of us the *North Western Company* to the Standing Orders Committee of the House of Lords for dispensation of the Standing Order requiring your consent to the subscription before mentioned.

9th. "That you opposed the last-mentioned bill through Parliament.

10th. "That at the *Wharnccliffe* meeting of your shareholders for considering and approving of the last-mentioned bill you rejected it.

11th. "That at the *Wharnccliffe* meeting of the shareholders of the *North Western Company*, called for the like purpose, you, as shareholders of that Company, voted for the rejection of the bill and procured other shareholders to do the like.

12th. "That, in the same session, you opposed the application by us the *North Western Company* to the Standing

Orders Committee of the House of Commons, for dispensation from the Standing Order requiring the consent of your Company at a *Wharnccliffe* meeting.

13th. "That, by reason of the several premises set forth in the 7th, 8th, 9th, 10th, 11th and 12th heads, the last-mentioned bill, when passed into an Act, contained no enactment authorising you to subscribe for and take shares in the capital to be raised for the purposes of that Act, whereby the benefit of such subscription was wholly lost to our said Company.

"And we further give you notice, that for these breaches, severally and collectively, and the injurious consequences thereof to us and our undertaking, we claim damages or compensation to the amount of £100,000; and that if you dispute this claim, or any of the matters above alleged, we shall in that case require that the claim or matters so disputed shall be referred to the arbitration of the said *John Hawkshaw*, in accordance with the provisions of the said agreement. And further, that if, within seven days from the service of this notice upon you, no answer or no definite answer thereto shall be received from you, we shall assume that you dispute the said claim and the several matters above alleged, and shall forthwith apply to the said *John Hawkshaw* to appoint a time for proceeding with the reference in respect of the same.—Dated 13th January, 1863."

The Plaintiffs contended that the 44th, 45th, 46th, 47th, 48th and 49th clauses of the said agreement were wholly beyond the power of the Companies to make, and were not binding on the Plaintiffs or on the *Midland Company*; and they charged that each of the matters complained of in the notice was a breach of some one of these clauses, and not of any other clause in the agreement.

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Argument.

Sir *Hugh Cairns*, Q.C., and Mr. *George Lake Russell* now moved for an injunction in terms of the prayer of the Bill :—

The clauses complained of are clearly ultra vires : *Colman v. Eastern Counties Railway Company* (a). If so, or if there be a reasonable question to be argued on this point, the Court will restrain the proceedings before the arbitrator till that point is determined : *London & North Western Railway Company v. Smith* (b). The balance of convenience is entirely on our side, as the Defendants cannot be prejudiced by the slight delay to which they will have been subjected if it should eventually be determined that they are right.

Mr. *Rolt*, Q.C., and Mr. *Osborne Morgan*, for the *Midland Company*, concurred.

Mr. *Giffard*, Q.C., and Mr. *Martineau* in opposition to the motion :—

This Bill, though nominally a Shareholders' Bill, is really the Bill of the *Midland Company* ; therefore it is a Bill by one party to a legal agreement seeking to prevent the other from proceeding at law for breach of the agreement. This the Court will not do : *Simpson v. Lord Howden* (c).

The clauses complained of are not ultra vires. No case has ruled that a Company may not contract to assent to parliamentary action ; and, till sanctioned by Parliament, no application of the corporate funds is required by the agreement.

At any rate, the Court will not interfere by interlocutory injunction, but would leave the parties to determine their rights by future proceedings to enforce the award when made. *Smith's case* has been practically overruled by

(a) 10 Beav. 1. (b) 1 Mac & G. 216. (c) 3 My. & Cr. 97.

Lord Truro in *The East & West India Docks & Birmingham Junction Railway Company v. Gattke* (a).

If the agreement be invalid, neither party will be prejudiced by going before the Examiner.

This is one entire agreement, and the Plaintiffs do not seek to set it aside.

[They also referred to *Pennell v. Ray* (b), *Corporation of Norwich v. Norfolk Railway Company* (c), *Eastern Counties Railway Company v. Hawkes* (d), *Bateman v. Corporation of Ashton* (e); 17 & 18 Vict. c. 125, ss. 11—17; 8 & 9 Vict. c. 16, ss. 128—135.]

A reply was not heard.

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VICE CHANCELLOR SIR W. PAGE WOOD :—

I cannot think that this case ought to be allowed to proceed before the arbitrator as the matter now stands.

Judgment.

An agreement has been entered into between the two Companies, dated 1st August, 1859—a perfectly legal and valid agreement so far as it comes within the powers conferred by the 48th section of the Act of 1857, and which has been determined on at a meeting of the shareholders, and sanctioned by the Board of Trade. But if any part of this agreement be beyond the powers of the directors to enter into, and not warranted by the constitution of the Company, of course it can have no effect: not three-fifths, nor ninety-nine one-hundredths, nor the whole body of shareholders except one, could sanction as against that

(a) 3 Mac. & G. 155. See also *London & North Western Railway Company v. Bradley*, Id. 336; *South Staffordshire Railway Company v. Hall*, Id. 353.

(b) 3 D. M. G. 126.
(c) 4 E. & B. 397.
(d) 5 H. L. Cas. 331.
(e) 3 H. & N. 323.

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one dissentient any agreement or stipulation in an agreement which is ultra vires.

So far, then, as this agreement is intra viros (and the greater part of it is unquestionably so), it is perfectly unexceptionable; approved by the Board of Trade, and sanctioned by a proper meeting.

That really reduces the question to the effect of these three clauses. [His Honour read clauses 45, 46, and 47 before set out.] So far as the "reasonable endeavours" mentioned in clause 45 are concerned, that expression seems to be too vague and general to rest upon. But when we find an agreement to make one-third of the necessary Parliamentary deposit, a grave question arises. For, upon the authorities in this Court—at least, since the decision of *Colman v. The Eastern Counties Railway Company*—it must be taken as settled law, that you cannot apply the dividends or any other part of the funds of the Company towards purposes unconnected with the undertaking. And the Court has taken a very strict view of the necessary relation between the purposes of the Company and the application of the corporate funds; for in the case I have mentioned the Company were prevented from applying their funds towards developing a steam-boat traffic which would, in all probability, have been of great benefit to the railway.

That is a very strong case, and seems to me to supply a sufficient answer to Mr. *Martineau's* argument. This Court considers it ultra vires to apply any part of the corporate funds to any purpose, even for the benefit of the Company, which is not within the four corners of the Act of Parliament by which the Company is constituted. In this case, the money applied to making the deposit in question would be withdrawn from the use and control of the *Midland* Company, probably for some months; and

during all that time, be it longer or shorter, the *Midland* Company, who have nothing to do with the purpose for which it is to be deposited, could neither make use of nor replace it.

Then, passing over the 46th and 47th clauses, I come to the 48th, which provides, in effect, that Mr. *Hawkshaw* shall be sole judge as between the Companies of all questions and differences which may arise under the agreement.

Now, what has in fact taken place is this :—The *Midland* Company (that is, the majority of the shareholders) have changed their minds as regards the policy of this agreement, and have opposed, instead of furthering, the last application to Parliament of the *North Western* Company ; and thereupon the *North Western* Company propose to refer to Mr. *Hawkshaw* the question what damages they are entitled to for the various breaches or alleged breaches of the agreement set out in this paper, and they claim £100,000.

[His Honour read the breaches.]

Now, with regard to every one of these breaches, except possibly the 6th, it seems to me that there is the greatest doubt as to the legality of the engagement entered into. A Company, existing for the single purpose of making and working the *Midland Great Western* Railway, enter into an engagement with another Company, incorporated for the purpose of making a different railway, and thereby the directors seek to bind all their shareholders not only to deposit a part of their corporate funds (which I consider to be *ultra vires*), but also to consent to a clause being inserted in any Extension Act which the *North Western* Company might thereafter within a limited time obtain, authorising the *Midland* Company to subscribe towards the proposed extension.

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It is admitted that not a sixpence of the funds of this Company could be so applied without parliamentary authority; but it is urged that there is no objection to an agreement not to oppose any application to Parliament for such authority, that is, that the mouths of the reluctant shareholders are to be stopped by the agreement.

Apply that argument to the case of insurance. If you have a Fire Insurance Company, it is well known that you cannot apply any portion of the funds to purposes of Marine Insurance. Are you then to say, "though we cannot do that directly, yet our directors can affix the common seal of the Company to an agreement which shall shut our mouths by binding us not to oppose any bill which may be brought into Parliament for the formation of a Marine Insurance Company to which we shall be empowered to force our reluctant shareholders to subscribe;" I cannot think it probable that such an argument could be sustained. But if that be so, that touches every clause in the notice of motion, every one of which seems to have directly or indirectly, the effect of superseding or suspending the operation of the *Wharnccliffe* order.

Then it is said, that this is really the Bill of the Company; but that rests merely on the fact that, at present, the Company by their counsel support the case of the Plaintiffs: to-morrow that may be different. A company is a fluctuating body, and I cannot lay any stress on their present action.

The principal argument of Mr. *Giffard*—and a very able one it was—has been this: the Bill is altogether novel in its attempt to interfere with a person trying his right in this way, a person who is in effect saying, "Let me get an award, valeat quantum, and then let me try the value of that award by action at law."

In the first place, it is by no means clear that the fact,

that the common seal of the Company has been affixed to this agreement, may not have a larger operation at law than it would in this Court. Here, at least, the shareholders are entitled to say, "We have not chosen Mr. *Hawkshaw* as the tribunal before which we should wish to proceed. So far as our directors could bind us to do so, they have done it, and in all matters intra vires we have no choice left, but in matters ultra vires they have not so bound us, because they could not do anything of the kind."

Part of the argument went so far as to contend that the referee was to be the judge whether the proposed application of the Company's funds was ultra or intra vires. Now I apprehend it would be impossible for the directors to say, "we will bind our shareholders to spend their money, which they have subscribed for the purposes of a railway, in the formation of a Steam Boat Company, if Mr. *Hawkshaw* shall say that we ought to do so;" and thus to tie down their shareholders to abide by the decision of a private tribunal, not chosen by them,—chosen under the common seal indeed, but not by them,—and that in a matter in which it is admitted that the directors could not bind them proprio vigore by agreement.

In this point of view the case is materially different from *Simpson v. Lord Howden*, which was an action brought on an instrument alleged to be invalid on the face of it, and an application made to stay proceedings merely on the ground of expense; not, as here, a case in which it is proposed to obtain an award, which, when gotten, will prove a source of considerable embarrassment to the Plaintiffs, and which, if they be right in their contention, will nevertheless be utterly invalid. And here I cannot wholly pass by the authority of *The London & North Western Railway Company v. Smith*, shaken as that case is by Lord *Truro's* decision in *Gatke's case*, though his Lordship not only does not overrule the former case, but expressly guards

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against the supposition that he intends so to do. [His Honour read the passage in the judgment in *Gatke's case*, commencing at the words, "It was strongly argued on the part of the Plaintiff" (a), and ending at "over-rule that decision."]

Now, in *Smith's case*, the question was this:—*Smith* claimed compensation not for a direct but for an indirect injury, as to which it was said that by one of the clauses in the Act he might go before a jury and get damages; and he claimed a right to have the damages assessed before it was determined whether or no he had any cause of action, leaving that point to be decided by action for recovery of the sum assessed; but Lord *Cottenham* said "No, let the right be tried first." Of course, when we consider that *Smith* was acting under the supposed authority of an Act of Parliament which appeared to give a right, and that therefore he might safely be left to take the consequences if he selected a wrong remedy, that decision was a strong one.

The case of the *London & South Western Railway Company v. Coward* (b) is more to the present purpose, because that case depended upon the construction of an equitable agreement. In that case there was some doubt what was the interest of the tenant who gave the notice for a jury; and the question was, whether he should be allowed to go before the jury in the first instance, or be restrained until the Court had determined the questions of right. On this the Vice-Chancellor of *England* remarked:—"It has struck me all along that it would be an extremely improper thing to allow these notices to go before a jury, and to be treated by a jury, when it appears to me in the first instance, that, if necessary, a Court of equity itself will determine what is the interest of the Company, and what is the interest which the tenant is entitled to have, and what

(a) 3 Mac. & G. 167.

(b) 5 Railw. & Canal Cas. 703.

is the rent that ought properly to be paid ; and if I were to dissolve the injunction, the very case which, as I understand it, the Bill seeks to have decided by the Court, will be thrown in a sort of huddled manner before the jury ; and I have no reason to suppose the case would be properly treated before a jury " (a).

Now, with every respect for Mr. *Hawkshaw*, of whom I entertain the highest opinion as an engineer, these observations are applicable to the present case. It is a question of agreement between the parties, a question on this very point, how far the agreement under which alone this arbitration can be resorted to is or is not a valid agreement ; and I think it would not be right, before the Court has determined that question, to throw these matters in a huddled manner (to use the words of the Vice-Chancellor of *England*) before Mr. *Hawkshaw*,—matters some of which are certainly *intra vires*, some of which appear to me to be *ultra vires*, and as to which he can have nothing before him to enable him to come to a correct decision. I think, moreover, that the shareholders might be prejudiced in a Court of law by the fact that the Company had protested, and protested ineffectually, against the making of the award.

On the question of convenience or inconvenience, I can have no doubt. I have not heard one single word to show that there is any object in proceeding with this reference on the 3rd of March rather than the 3rd of April, or of May, or of June ; and if the Defendants succeed at the Hearing of the cause, it may well be proceeded with by that time. Wherefore, considering the strong preponderance of convenience in having the rights ascertained before this reference, and that no practical inconvenience will arise from suspending the reference until it is determined

(a) It appears from the report of *Gatke's case* that this case was affirmed by the Lord Chancellor.

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what the agreement really is on which the referee is to act in assessing compensation, I think I ought to grant an injunction to this extent,—that the Defendants should be restrained from proceeding with the aforesaid reference to Mr. *Hawkshaw*, or otherwise acting under the notice of the 13th of January, 1863, till further order of this Court.

It was agreed, that, so soon as the cause was ready for Hearing, the Defendants might apply to have it advanced, the Vice-Chancellor remarking:—"In cases where the injunction is granted, that may be done; not where it is refused."

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The cause now came on for Hearing.

The only material addition to the evidence consisted in an affidavit made by the Chairman of the *North Western* Company, from which it appeared, that in 1857 the *Midland* and *North Western* Companies had been promoting rival bills, and that the opposition had been compromised by an agreement entered into between three of the promoters of the *North Western* on the one hand, and three of the directors of the *Midland* on the other, of which the material articles were as follows:—

2a. "The *Midland* Company are to submit this present agreement, and the bill as amended in committee, to a *Wharnccliffe* meeting of their shareholders, to be held on the earliest possible day, and shall obtain the consent of the necessary majority thereto. And in the event of their failure so to do, then the *Midland* Company shall consent to any application which may be made to Parliament within two years, to enable the *North Western* Company to enter into working and traffic arrangements with the *Great Southern and Western* Company.

4. "The *North Western* Company to be the party to

extend the *North Western* line to *Boyle, Castlebar, Westport, and Ballina*, so soon as they shall deem it prudent, provided the applications to Parliament are at any period within the next five years; and in the event of the *Midland Company* failing to obtain in this or the ensuing session powers to extend their line from *Longford to Sligo*, the *North Western Company* to be at liberty to apply to Parliament, in the next following session, for powers to extend their railway to *Sligo*.

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5. "The *Midland Company* to provide one-third part of the capital necessary for the extensions of the *North Western Company* to *Boyle, Castlebar, Westport, and Ballina*, and to nominate one-third of the directors, provided they are called upon so to do within the said period of five years.

6. "In the next session of Parliament the *Midland Company* shall concur in an application made by the *North Western Company*, to enable the *Midland Company* to subscribe one-third of the capital required for the *North Western* line of this session from *Athlone to Castle-rea*, and to enable the *Midland Company* to nominate one-third of the directors of the *North Western Company*; the number of such directors to be increased by such application, if necessary. The *Midland Company* to provide the necessary subscription contract and deposit of money for the application to Parliament for such purpose."

And the deponent alleged, that all that had been done was in pursuance and consequence of that agreement; and that no consideration had ever been given to the *North Western Company* for having thereby bound themselves irrevocably to the *Midland Company*, rather than the *Great Southern and Western Railway Company*, other than that contained in the 4th, 5th, and 6th paragraphs of that agreement.

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The Plaintiff, *George Woods Maunsell* filed an affidavit in opposition to this, traversing some of the allegations therein, but not raising any point which appeared to be material to the questions in the cause.

Sir *Hugh Cairns*, Q.C., and Mr. *G. Lake Russell* for the Plaintiffs:—

Mr. *Hawkshaw's* award was void upon the face of it, and was only intended to have the effect, which it actually had, of inducing the House of Commons to suspend the Standing Order: that cannot, therefore, be urged against us. Then it is said that we have been till just lately a minority of our own Company: that is not so now; and if it were, it is immaterial, supposing the agreement itself to be ultra vires.

It will be urged that the *North Western* Company are not to be affected by this consideration; that they have an agreement under our common seal; and that, therefore, this Court ought not to interfere, but leave the parties to their legal remedies. But they, with their eyes open, entered into this agreement with persons whom they knew to be agents who were outstepping their powers; therefore they, as well as the *Midland* Company, ought to be restrained from acting on these clauses.

Again, it will be said the whole question is one exclusively for the cognizance of a Court of law; "let the award be made, valeat quantum, and then you can resist its enforcement." But the arbitrator might award one entire sum for all these breaches, and we might find ourselves unable to resist the action, or to apportion the damages, if the Court should think any one of the complaints substantiated.

A further objection will be, that the entire agreement must stand or fall together, and that we cannot treat part of it as valid and part as invalid; that is not a considera-

tion for the Plaintiffs. If the *North Western* Company think that our success in this cause will entitle them to have the whole agreement set aside, let them file a Bill directed specifically to that purpose.

But all this depends on the question—Are the clauses complained of ultra vires or not? Let us consider them in detail.

Clause 44 is clearly ultra vires: it provides that for all future time we are to assent to the passing of Acts authorising us to subscribe to their extensions—*i. e.* it proposes to do away with the effect of the *Wharndcliffe* order; and in fact, one of the breaches of agreement complained of is, that at their *Wharndcliffe* meeting we voted against the project in our capacity of shareholders in their undertaking; if we were not entitled to do so, the *Wharndcliffe* meeting is a nullity.

Clause 45 provides for the application of our capital to the purposes of their Company in a manner in which, according to the standing clause inserted in all Acts of this kind (a), we could not have used it for our own purposes.

Clause 46 is rather a covenant on their part than on ours; but it is objectionable, as it professes to secure to us advantages which we could not enforce against them.

Clause 47 is an attempt, so far as regards future extensions of their Company, to deprive the shareholders for the time being of our Company of that right which the law expressly gives them of judging for themselves as to the propriety of their running agreements.

(a) "A clause shall be inserted in every railway bill, prohibiting any Railway Company from paying out of the capital which they have been authorised to raise for the purposes of any existing Act the deposit required by the

Standing Orders to be made for the purposes of any application to Parliament for a Bill for the construction of another railway."
—L. S. O. clxxxix, 6.—C. S. O. 141.

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Clauses 48 and 49 are not *ultra vires* in themselves, save in so far as they provide or attempt to provide a means of enforcing the foregoing invalid stipulations.

If, then, we have established that these provisions are unauthorised and illegal as against us, it necessarily follows that we are entitled to come here to prevent our own directors from carrying out this arrangement in excess of their powers, and to prevent the *North Western Company*, who, at the highest, are purchasers with the fullest notice of the invalidity of the agreement, from endeavouring either to enforce the same, or to assess damages for non-performance thereof.

Mr. Rolt, Q.C., and *Mr. G. Osborne Morgan*, for the *Midland Company*, supported the Plaintiffs' case, but took no part in the argument.

Sir Roundell Palmer, S. G., *Mr. Giffard, Q.C.*, and *Mr. Martineau*, for the *North Western Company* and the Defendants named as directors thereof :—

There are two questions to be considered in this case :
 1st. Is there in reality anything *ultra vires* in the clauses complained of? 2nd. If so, is this a case in which the Court will interfere by injunction to prevent the parties from completing the proceedings before the arbitrator, whatever his award may be worth when obtained?

In discussing the former of these questions, we may leave clauses 48 and 49 entirely out of sight, as they are admittedly valid, unless invalidated by their relation to the former clauses, 44—47. But there is no possible objection to the 44th clause, which only provides, that, if Parliament authorise it, they will subscribe additional capital. There is nothing objectionable in their pledging themselves not to oppose our applications.

The 45th clause is equally harmless : it merely contem-

plates a deposit of the money of the Company (not saying "capital") for a temporary purpose, which money will be returned to them intact if the bill does not pass, and the disposal whereof will be provided for by the Act if the bill should become an Act. The Standing Order referred to by the other side shows that the Legislature contemplated such a deposit if made out of income.

The Court will not interfere with applications to Parliament for such a purpose: *Ware v. Grand Junction Waterworks Company* (a), *Stevens v. South Devon Railway Company* (b), *Hattersley v. Lord Shelburne* (c).

[The VICE-CHANCELLOR.—You cannot apply at the expense of the Company, nor can you pay any expenses out of the corporate property without the authority of Parliament (d). I remember that this question was discussed, in 1828, before a committee of the House of Commons, and that Lord *Eldon* was consulted by the committee, and gave it as his opinion that the case of a Company was different from that of an individual trustee, and that there was no power to restrain them from assenting; and that opinion led to the establishment of the *Wharnccliffe* order.]

The *Solicitor-General*.—Well then, the next clause, which applies the traffic arrangements to future extensions of the Company, is unexceptionable; none of these clauses therefore are ultra vires.

Besides, Parliament has already twice recognised this as a valid agreement; first, when it passed the *Castlebar Extension Act* in 1860, and again in 1861 when the *Westport Extension Act* was passed.

(a) 2 R. & M. 470.

(b) 13 Beav. 48.

(c) 10 W. R. 881.

(d) Conf. *Att.-Gen. v. Corpo-*

ration of Norwich, 16 Sim. 225;
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These Plaintiffs do not come into Court "with clean hands." They have, by means of this very agreement, secured to themselves substantially the control of the working of our line, which we might have given to the *Great Southern and Western Railway Company* instead of to them; and then they ask your Honour to interfere in order to relieve them from the operation of that part of the agreement which constitutes the sole consideration which we receive for all we have given them. Can the Court say, "There are certain parts of this agreement from which the *Midland Company* should be relieved and yet the *North Western Company* must be bound by the rest of the agreement, unless they are willing to incur further litigation and expense by filing a cross Bill?"

This case is ripe for decision; and therefore the objection which in *Simpson v. Lord Howden* (a) was held sufficient ground for refusing to withdraw the case from the jurisdiction of a Court of law, applies in full force.

Finally, the Plaintiffs come here to ask the Court to restrain an act, which, if illegal, cannot hurt them; but if legal, is the right of the Defendants; and the circumstance, that the agreement is under the common seal of the Company, makes no difference in this respect: *Gage v. The Newmarket Railway Company* (b).

[The VICE-CHANCELLOR asked, whether, if the Defendants were right in respect of the eleventh alleged breach, it would not have the effect of getting rid of the operation of the *Wharncliffe* order.]

The *Solicitor-General*.—That refers to our own *Wharncliffe* meeting. Any individual shareholder, and therefore the *Midland Company* in the capacity of a shareholder in the *North Western Company*, might be bound by agree-

(a) 3 My. & Cr. 97.

(b) 18 Q. B. 457.

ment to attend the *Wharnccliffe* meeting, and concur: and it was because, being so bound, they did not concur, that the House of Commons suspended the Standing Orders in the case of the *Westport* Extension Act.

We have a right to have the legal questions tried at law. Lord *Cottenham* certainly appears to have held otherwise; but that case and those which followed it have been virtually overruled by Lord *Truro* in *Gatke's case* (a). The Bill must therefore be dismissed.

Sir *Hugh Cairns*, Q. C., in reply:—

There is very considerable reason to regret that Lord *Cottenham's* decisions have been overruled: but the point does not govern this case.

Each of these shareholders is a cestui que trust, whose trustees, the directors, are acting in a manner which he considers to be a breach of trust; and he therefore has a right to come to this Court to have the question, whether this be a breach of trust or not, decided: and if it be so, then he is entitled to an injunction not only against his own trustees, but also against all persons dealing with them with notice of the breach of trust.

It is not here material that Parliament has acted on the powers given by this agreement. The question is, what was the effect of the agreement when entered into: and moreover, all that Parliament has done has been to confer these powers contingently on their obtaining the consent of a *Wharnccliffe* meeting: *Westport Extension Act*, s. 23.

On the remaining point: This is not the agreement of the Plaintiffs, but of the Company; and the Plaintiffs have no right to have it cancelled or modified in any way—their right solely extends to preventing their own trustees from committing a breach of trust, whether they have agreed to do so or not.

(a) 3 Mac. & G. 155.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case has been very ably and fully discussed, and I think I am enabled at once to explain clearly the view I take of the matter.

I must, in the first place, consider the position of the Plaintiffs. They are not the *Midland Great Western* Company coming here to set aside their own agreement, but shareholders who desire to be relieved against the act of their directors, by which they (the Plaintiffs) are bound, under the common seal of the Company, to an arrangement, to which, as they say, they are not liable. That is a very different position from that of a Company coming here to be relieved from the consequences of its own act.

In all cases of this description the point to be regarded is, whether there is or not in the act contemplated by the Company, any stipulation or engagement to which it exceeds the power of the directors to bind their shareholders. In this point of view the case is entirely distinct from *Gatlke's case*; and the reasoning on which the Lord Chancellor there decided that a Court of law was the proper tribunal has no application here. That was a question between the Company and a stranger; this is a case in which shareholders, who are completely out of the purview of the Courts of law, come here to restrain their own directors from exceeding their legitimate powers. The Court of law in which the threatened action should be brought might or might not uphold the award, the directors might confess judgment, or might submit to the judgment of the arbitrator without litigation; and in all or any of these cases the shareholders would be powerless except through the medium of this Court. Surely, then, the shareholders have a right to come here to have it ascertained whether the directors have or not exceeded their powers, and, if they have done so, to restrain them, and all persons who have dealt with them, from taking advantage of such excess.

Looking on the matter in this light, it seems clear to me that the two substantial articles do considerably exceed the powers of the directors of the Company. [His Honour read Articles 44 and 45.] The engagement here is two-fold: first, actively to support the extension bills of the *North Western Company*; and, secondly, to subscribe a portion of the Parliamentary deposit. I think that each of these stipulations it was beyond the powers of the directors of the *Midland Company* to agree to. The extension bills in question were bills whereby the *Midland Company* were to be authorised to subscribe towards the proposed extensions of the undertaking of the *North Western Company*. Now Parliament has taken care to shield the shareholders in Railway Companies from having the corporate funds diverted from the original purposes of the undertaking without the consent of three-fourths of their body, given at a general meeting of the Company convened in compliance with the *Wharncliffe* order; but if this agreement were to stand, it would be possible for a simple majority of the Company to force a reluctant minority, exceeding one-fourth, to subscribe to the undertaking of another Company; for if the common seal of the Company were set to an agreement of this sort, and that agreement were to be held valid, the minority would be placed in this dilemma:—either they must sanction the proposed Act at the *Wharncliffe* meeting, in which case a simple majority would be sufficient to bind the Company, after the Act had passed, to take up the shares; or else, if they positively refused to sanction the proposed bill, then they would have done an act which would prevent the Legislature from giving effect to the application, and which would thus be a breach of this stipulation in the agreement, and therefore the other Company would be entitled to damages. That this is the view taken of the agreement by the *North Western Company* is clear from the 10th breach which they have assigned. [His Honour read it.] But it is obvious that

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this would be an entire destruction of the protection which Parliament designed to provide for shareholders, and of which they are intended to have an opportunity of availing themselves in every session in which there is any application to Parliament.

Then the Solicitor-General asks, "Is there anything to prevent a Company from agreeing to apply for a bill?" No doubt they may apply, the governing body of the Company are competent to do that, though ever so influential a minority or even a majority of the shareholders were to object; that is the very reason for the *Wharnccliffe* order, which makes such an application futile unless made with the consent of three-fourths of the shareholders at a special meeting. But though it is well settled that they may apply, it is equally certain that they cannot expend one farthing of the corporate funds in furtherance of the application. Can it then be argued that they can covenant to apply? That is to say, can it be maintained, that, although they are not competent to spend a single sixpence of the Company's money in aid of the application if they apply, still they can bind that very money by covenant so as to render it liable to pay damages if they do not apply? If it were necessary to decide the point at present, I should be of opinion that the *Wharnccliffe* order supplied a sufficient answer to the question.

Mr. Giffard says, "There is no objection to a covenant not to oppose;" that may be, though I do not intend to express any opinion to that effect (a): but here, the covenant is to assist the application; and I have no doubt that that is ultra vires.

(a) This point was much discussed in *Parker v. The River Duna Navigation Company* (1 De G. & Sm. 192), but not decided; the Vice-Chancellor having induced the parties to come

to an arrangement beneficial to both sides; but His Honour expressed a strong opinion that he had no power to restrain the Company from entering into such an agreement.

I may pass by the covenant as to the subscription contract; though, if such a thing were still required, I think the clause would be *ultra vires* in this respect also, as, if the directors could not find a person to provide the requisite funds, the Company would be rendered liable in damages.

The remaining branch of this clause is also, I think, *ultra vires*. The principle upon which it is held, that the corporate funds cannot be applied to any purpose other than the purposes of the Company, must extend to the case of these Plaintiffs. They say, in effect, "we will not allow any portion of our capital or earnings to be used in any manner as a deposit for the benefit of a company to which we are strangers; still less for the purpose of enabling that company to carry into effect a measure the result of which would be that a reluctant minority of more than one-fourth would be compellable to subscribe to another, it might be to a rival, undertaking." It is not, therefore, necessary to consider the clause which has been referred to as "the standing clause," which prohibits the Company from making the parliamentary deposit out of its capital; for although it be true that an inference might arise, that such deposit might be made out of income, that can only apply to the case of a company which is minded to extend its own works, and not to a deposit for the benefit of the undertakings of a different company. I must therefore hold that the whole of clause 45 is *ultra vires*.

As to clause 46, I do not think the Plaintiffs are entitled to complain of it. It comes to this, that the *North Western* Company covenant, that if they obtain any extension Acts they will secure certain privileges to the *Midland* Company. This may be a proceeding in excess of the powers of the directors of the *North Western* Company of which their own shareholders might complain; but I do not think that these Plaintiffs can come here to set aside the agreement merely on the ground that they would probably find themselves unable to enforce it.

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The Solicitor-General says that Parliament has already twice recognised and ratified this agreement, in the Extension Acts of 1860 and 1861: I do not so read the Acts. It is very common to have provisional agreements entered into in such cases; agreements whose validity is expressly made contingent upon the concurrence of Parliament, and therefore to which no objection can be taken. When the Legislature is asked to give effect to one of these agreements, they do not stop to consider whether it could stand per se as an agreement; but they recite it, and if they think proper so to do, they take steps to carry it into effect, not by ratifying it, nor by declaring its validity in any way, but by conferring the necessary powers on the parties. No advantage, therefore, can be gained by the supposed parliamentary sanction.

The vice of clause 47 is this,—power was taken from Parliament to make traffic arrangements, to be binding for not more than ten years. Then the agreement of which this clause forms a part was entered into; and so far as this agreement only affects the traffic on the existing lines, it is right and proper and under due parliamentary authority: but this clause seeks to extend these arrangements to all extensions which the *North Western Company* might at any time within three years be permitted to make. It might be, that Parliament might not think fit to grant powers to make traffic arrangements on the extension lines; and then the effect of this clause would be, that although such arrangements could not be properly made under direct parliamentary authority, they would be obtained, without such authority and without the sanction of the Board of Trade, under this agreement. It is, in fact, saying, “if Parliament does one thing then we will do another: if Parliament authorises the extension of your line, then we will apply to that extended line provisions not authorised by Parliament.” This is clearly ultra vires.

Clauses 48 and 49 are only objectionable in their relation to the preceding clauses ; and all I can do in reference to them is, to declare that they shall not be used so as to give effect as against the *Midland* Company to any of the provisions against which I have decided.

I must now come to clause 44, which I have intentionally reserved to the last. This clause is in effect a covenant not to oppose such a bill as is there described. [His Honour read the clause.] Now, as a general rule, any subject whosoever, be he individual or body corporate, may apply to Parliament for any special law which he thinks he can induce the Legislature to pass for his benefit ; and therefore, if this Article has any operation at all, it must take effect as a covenant on the part of the *Midland* Company not to oppose the application. On the effect of such a covenant generally, I express no opinion : but in this case it would be a covenant not to oppose a bill which, if passed into an Act, would compel a reluctant minority to subscribe towards the capital of another company without having had the protection of a *Wharncliffe* meeting ; and I think that such a covenant is open to the same objection which runs through these clauses generally, that it is an attempt to stipulate these shareholders out of the benefit of the *Wharncliffe* order. I am told that it is a novelty to interfere with the making of an award ; but I should have taken exactly the same course had this been a Bill to restrain an action on the award. The Plaintiffs could not be obliged to trust to what their directors might choose to do by way of defence to the action, but would have had a right to come here to protect themselves from any damage which might flow from the unauthorised covenants of their directors.

Then Mr. *Giffard* says, "if any part of this agreement is touched, it must be cancelled in toto." But the Plaintiffs have nothing to do with the agreement, and

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—
Judgment.

are not entitled to ask me to pronounce any part of it void to which their directors were competent to bind them. They can only ask me to release them from the consequences of acts of their directors by which they are not bound; and they are not excluded from this relief because the same instrument which contains the invalid provisions also contains other matters and things over which they (the Plaintiffs) have no control. The effect of this decree upon the agreement as a whole, if litigated at all, must be litigated in a proper proceeding between the Companies, to which the Plaintiffs will not be parties.

There must be a declaration that the agreement of August, 1859, so far as it purports to bind the shareholders of the *Midland Great Western Company* to clauses 44, 45 and 47, and so far as by clauses 48 and 49 it purports to subject the said Company to any arbitration, &c., or damages in respect of any breach or non-performance of the stipulations contained in the above-mentioned clauses, is void as against the *Midland Great Western Company*; but this declaration is to be without prejudice to any question as to the validity or invalidity of the said agreement further or otherwise than as hereinbefore declared. Then restrain both Companies, their officers, servants, and agents from acting on the agreement in respect of any of the covenants hereby declared to be void. I think it is not a case for costs against the *North Western Company*; but the Plaintiffs may have their costs as between solicitor and client out of the funds of their own Company.

PARKER v. WHYTE.

THIS was a motion for an injunction to restrain the Defendants from holding or permitting to be held any sales by auction on the premises mentioned in the Bill.

The premises in question were, by an indenture dated 9th June, 1861, demised by the Plaintiff to the Defendants *Whyte* and *Adams*, for the term of $2\frac{1}{2}$ years; and the lease contained a covenant on the part of those Defendants "that they should not nor would permit or suffer any sale by auction to be held or made in or upon the said premises or any part thereof, without the license and consent in writing of the Plaintiff."

Whyte was the manager of the *Rhenish Coal Company*, and *Adams* was the agent in *London* of the *Dutch Rhenish Railway Company*, and the premises in question were used by them principally for offices. The premises being larger than they required, a portion of the house was sublet by them to one *Hammond*, who was secretary to the *London General Coal Company (Limited)*; and in the sub-lease no covenant of the nature above described was inserted.

On the 17th of September, 1862, *Hammond*, who was the person ostensibly in occupation of the house, again sublet a part of his portion to the Defendant *Sparks*, who swore, that, at the time of such sub-letting, *Hammond* was aware that he (*Sparks*) intended to use the premises as a shop for the sale of *Birmingham* jewellery.

Sparks expressly denied that he had any notice of the covenant in the original lease; and he said that he had not entered into any such covenant. He, however, denied any intention of holding sales by auction.

On the 16th April, 1863, *Sparks* sub-let a portion of the

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May 30th.

*Lease—Sub-
lessee—Cove-
nant against
Trade.*

A sub-lessee of a house, whose immediate lessor is bound by covenant not to carry on a particular trade, will be restrained from carrying on such trade, although he took his lease without notice of the covenant, at least unless it appears that he made careful inquiries at the time of taking his lease, and learnt nothing which should have set him on further investigation.

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premises to the Defendant *Atkinson*, for the term of six months from that day. It appeared that *Atkinson* on this occasion had asked *Sparks* whether there was any objection to his using the premises for the purpose of holding sales by auction; and that *Sparks* had replied that he knew of no objection, and had shown him (*Atkinson*) the agreement from *Hammond* under which he (*Sparks*) held, which agreement contained no trace of any such covenant as that now relied on.

On the 14th of May, a public notice was affixed to the premises, announcing that the Defendant *Salmon* had received instructions to sell by public auction thereon the stock of the proprietor (the Defendant *Atkinson*).

Thereupon the Plaintiff caused the Defendants *Whyte*, *Adams*, and *Salmon* to be served with notices threatening Chancery proceedings to restrain the sale; but these Defendants declared that they had no power in the matter: and the Bill was then filed.

Argument.
 ———

Mr. *Giffard*, Q. C., and Mr. *Hetherington*, for the Plaintiff:—

This is a mere question whether a lessor is to lose the benefit of the stipulations he has taken care to insert in his lease, by reason only that his lessee has sub-let to other parties who propose to set these stipulations at defiance. That question was finally settled in favour of the Plaintiff by *Tulk v. Moxhay* (a).

Mr. *Stiffe Everitt* for the Defendants *Sparks* and *Atkinson*:—

When covenants run with the land, the Court will re-

(a) 2 Ph. 774.

strain all assignees of the lease and sub-lessees from breach of the covenant; but when that is not so, the Court will only act in the circumstances pointed out in *Tulk v. Moxhay*, i.e., when notice of the covenant is brought home to the occupier. We are sub-lessees of a sub-lessee, and therefore cannot be held liable to the covenants in the lease: *Moore v. Greg* (a).

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A very similar case to this was lately decided by Vice-Chancellor *Kindersley*; *Moses v. Taylor* (b). Moreover, *Atkinson* actually inquired of his immediate lessor whether he was entitled to hold such an auction as that complained of, and was assured that he was so. That puts an end to any idea of constructive notice: *Jones v. Smith* (c). The lessor has a complete remedy by ejectment, and this Court will only deal with a personal equity in these cases: *Hodson v. Coppard* (d).

[The VICE-CHANCELLOR.—In that case, the tenants were not parties.]

Mr. *Everitt*.—If this were a matter of course, they would not be necessary parties.

[He also referred to *Coles v. Sims* (e).]

Mr. *Giffard*, Q.C., in reply:—

Moses v. Taylor was a very peculiar and doubtful case. There is no authority for saying that a person in the position of the Defendant is a purchaser for value without notice; and the only ground on which the Vice-Chancellor could have held that the Plaintiff had mistaken his remedy was, that the act was past and done, and there was no longer anything to enjoin against: that is not so here. Is the lessor to lose the benefit of a valuable lease, because his lessee chooses to carry on a noxious trade?

In *Hewitt v. Loosemore* (f), and that class of cases,

(a) 2 Ph. 717.

(d) 29 Beav. 4.

(b) 11 W. R. 81.

(e) Kay, 56; S. C. 5 D. M. G. 1.

(c) 1 Hare, 43.

(f) 9 Hare, 449.

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parties have escaped being fixed with notice, because they made reasonable inquiries, and answers were given sufficient to put them off; but no man can shelter himself under a plea of purchase for value, unless he has used all reasonable precaution.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The true answer to the difficulty suggested by Mr. *Everitt* I take to be this:—Will the Court allow a person to take a valuable house without any inquiry and, then say, ‘I will do anything I please, because I did not choose to find out from my lessor what interest he had in the property; and therefore I am not affected with notice?’ The least inquiry here would have elicited the information as to the covenant.

The question is of the largest possible description: suppose a letting of a very valuable house to a desirable tenant, with the usual covenant against exercising trades, and the lessee sublets to a person who opens a public house—could it be argued that the landlord must either determine the lease by entry for condition broken, or submit to the nuisance? No person is entitled to take property of this description without asking a single question on the subject: it is said, indeed, that such is the custom in the case of these short terms; but that cannot be recognised.

If you simply take a sub-lease without conditions, you are entitled, and bound, to examine your lessor’s title: if you have contracted not to do so, there may be a question as to the effect of that; but if you do neither one nor the other, but enter without any inquiry of any sort, you must be taken to know that the property is holden under some title or other; and if you do not take any means to discover what that is, you cannot be looked upon as a purchaser

without notice, which is the true ground of exemption in the cases cited.

The present seems to be a hard case against *Atkinson*. He asked his immediate lessor whether he had power to let the premises for the purpose of holding an auction there; and *Sparks* said that he had. I assume that he shewed him the agreement from *Hammond* under which he himself held, and it is admitted that that agreement is silent on this point; but then it appears that *Hammond* was in possession merely as secretary to the *London General Coal Company (Limited)*, and his occupation as secretary would not imply any power on his part to alter the condition of the premises: now, if the rule be, that you must inquire into the title of your lessor, I think you ought not to have rested content with seeing an agreement from *Hammond* merely, without going back to some one who would have more complete title, than the secretary of such a Company could have merely as secretary. It is impossible to allow a person to shelter himself under a plea of purchase for value without notice, if he chooses to rest satisfied without knowledge which he has a right to require.

The Bill must be dismissed as against *Salmon* without costs; and an injunction must be awarded against *Atkinson* and his agents, in the terms of the notice of motion. Costs of the motion to be costs in the cause.

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Judgment.

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GRUNDY v. HEATHCOTE.

February 17th.

*Mortgagor and
Mortgagee—
Purchaser with
Notice.*

The trustees of a sum of money charged on real estate, who is also owner of the estate subject to the charge, is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to answer the charge; and the estate so sold cannot be followed into the hands of a purchaser with notice of the trust.

BY a deed dated in the year 1810, *Marten*, the testator in this cause, mortgaged certain real estates known as *Cotes Park* and *Wheatcroft*, to one *Balguy*, to secure £5000 and interest.

Marten, by his will, bequeathed an annuity of £15 per annum to *Mrs. Grundy* (the mother of the Plaintiffs) for her life, and a legacy of £300 to her children, payable after her death; and he charged the said annuity and legacy on his real estate; and subject thereto and to his debts he devised all his real and personal estate to the trustees of his will, whom he nominated his executors.

By indentures of lease and release, dated in March, 1834, between *J. Marten* and *A. Marten* (the trustees) of the one part, and the executors of *Balguy* of the other part, reciting the previous mortgage and the testator's will and death, and that the *Martens* owed £500 to *Balguy's* estate over and above the £5000, the estates in question were conveyed to *Balguy's* executors, with a power of sale at any time after the 29th of September, 1834; and it was declared that the produce of the sale should be applied, first, in payment of the £5000 and interest, next in providing for the charge of £300, then in payment of the £500 and interest, and the surplus (if any) for the *Martens*.

By an indenture, dated July 1850, and made between the *Martens* of the one part, and *Balguy's* executors of the other part, it was agreed that the mortgagees should accept *Cotes Park* in full of all demands in respect of their mortgage; and *Wheatcroft* was thereupon re-conveyed to the *Martens* discharged from the mortgage debt, but expressly charged with the payment of the annuity of £15 to *Mrs. Grundy*. No mention of the legacy of £300 was made in that deed.

At this time there was more than £6000 due to *Balguy's* estate in respect of the mortgages.

Immediately after this agreement *Balguy's* executors sold *Cotes Park* to the Defendant *Heathcote* for £6000.

By an indenture dated in June, 1854, and made between *J. Marten* of the one part, and *A. Marten* of the other part, the entirety of *Wheatcroft* was vested in *A. Marten* in fee.

A. Marten died in 1858, having by his will devised *Wheatcroft* to two of the Plaintiffs in fee.

Mrs. Grundy died in 1861, and thereupon her three children (the present Plaintiffs) filed their Bill against *Heathcote* and the representatives of *Balguy*, claiming to have the legacy of £300 paid to them out of the surplus of £1000 which *Cotes Park* had realised over and above the £5000 charged on the estates by the testator; and in default of such payment they claimed that the said legacy was a still subsisting charge on *Cotes Park*.

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Statement.

Mr. *Daniel*, Q.C., and Mr. *Grenside*, for the Plaintiffs.

Argument.

Mr. *Currey*, for the Defendant *Heathcote*.

Mr. *John Pearson*, (Mr. *Giffard*, Q.C., with him), for the representatives of *Balguy*:—

This is a case of a mere mortgage, not a trust at all: the sale complained of was only a mode of payment arranged between debtor and creditor; there was then more than £6000 due. The Plaintiffs do not represent any party to the deed, and are mere strangers to the whole transaction.

Mr. *Daniel*, Q.C., in reply:—

This was not a transaction between debtor and creditor.

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The *Martens* had a duty to perform as to the debt of £5000; and having also assets in their hands, and being residuary legatees, they arrange with their creditor that he should take the trust assets charged with the liabilities: had they not stipulated for that, the arrangement would have been a breach of trust, which this Court will not presume.

The special arrangement with respect to the annuity shews that the annuity and that alone was to be charged upon *Wheatcroft*.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This is a very singular case, but the true contest can be readily arrived at. The Plaintiffs are entitled to a sum of £300, which was charged on all the testator's real estate. Part of this estate two of the Plaintiffs are in possession of; but it does not appear that there has been any sale or purchase of the estate. There has, indeed, been a sale by one of the executors and residuary devisees to the other; but that will not dispose of the question. The remaining Plaintiff has an obvious right to come against the two; but then they say, there was a further portion of the estate which has been sold, and from which they contend this charge should be raised. It is clear that, unless the deed of 1834 gives them such right, they can have no right to follow the sold portion of the estate so long as there is unsold estate sufficient to satisfy their claim. Now, at the date of this deed, the executors were themselves owners of the estate, subject to the charge, and were therefore fairly entitled to mortgage the fee by way of further charge to secure the £500 as well as the £5000, and there does not appear to have been any attempt to conceal the legacy. The deed was clearly a mortgage deed, [His Honour read the deed, as

above stated,] and was not intended to impose any trust on the mortgagees. If there had been any tender of this money before sale, even after the time fixed by the deed had elapsed, the Court would obviously have compelled acceptance; but if so, the transaction was a mortgage. If it had not been for the fact that the vendors were also the trustees, this would have been a mere case of a mortgage, and the Plaintiffs would have no right to file a Bill; but the vendors as executors were entitled to say to the mortgagees, "If you sell, you must pay the £300 in priority to the £500, because as trustees of this charge we are entitled to be discharged." *Gregory v. Williams* (a) shows what, in such a case, are the rights of a person not a party to the contract, and that the Plaintiffs would in this respect be entitled to stand in the place of the *Martens*, on the ground that the trustees were otherwise committing a breach of trust. If therefore there had been no other estate it seems to me that considerable question would have arisen, as strangers taking under these circumstances would have been fixed by the subsequent facts.

Then comes the subsequent transaction by which these mortgagees accepted *Cotes Park* in discharge of their claims, and reconveyed *Wheatcroft* to the mortgagors. The evidence as to this transaction is to be found in Mr. *Barber's* affidavit, and the result of that affidavit is, that there is no evidence of any express contract that the £300 was to be charged on *Wheatcroft*, which was expressly made subject to the annuity; but such a charge is not inconsistent with the deed, and its whole scope and object is that *Wheatcroft* should be subject to the entire charge. The *Martens*, being competent to do so (as they had other real estate), release *Cotes Park* from the charge in consideration of the release of the rest of the real estate from the mortgage. Why should the mortgagees give up £234 odd, as the evi-

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GRUNDY
v.
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—
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3 Meriv. 582.

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 Judgment.

dence shows they did, and further agree to pay a sum of £300 in addition? I do not think that the mere circumstance that the annuity of £15 is mentioned, and the charge of £300 is not mentioned, has any operation on the rights of the parties, particularly when we consider that it must have been before their eyes at the time.

The natural effect of the agreement is, that *Wheatcroft* is still liable to this debt; the result of which is, that the supposed presumption of a breach of trust is rebutted by the existence of *Wheatcroft*, which is not shown not to be sufficient to answer the charge in question.

I dismiss this Bill with costs, on the express ground that the Plaintiffs are already in possession of the property which is really subject to this charge.

March 2nd.
 Pleading—
 Parties—Mul-
 tifariousness—
 Vendor and
 Purchaser.

WEST MIDLAND RAILWAY COMPANY v. NIXON.

THIS case came on upon demurrer, the facts stated in the Bill being as follows:—

Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase-money, is a proper party to a suit by the purchaser to have the right to the purchase-money ascertained, and for specific performance against the vendor.

By an agreement dated the 21st of July, 1854, *Seymour Phillips Allen* agreed to grant a lease of minerals, with certain surface rights, to Messrs *Nixon & Co.* for 99 years, containing a proviso which reserved to the lessors an interest in any compensation which Messrs. *Nixon & Co.*

Tasler v. Small, 3 My. & Cr. 63, distinguished.

might obtain from any company which should proceed with a certain projected railway over the land.

In 1857, a company since merged in the Plaintiffs' Company, obtained powers to construct a railway over the land, as to which some doubt existed whether it came within the description of the projected railway referred to in the lease.

By an agreement dated the 25th of June, 1857, *Seymour Phillips Allen* agreed to sell to the Company such land as they might require at a certain price per acre.

On the 19th of November, 1861, the Company entered into an agreement with *Nixon & Co.* for the purchase of their interest in the lands required for the railway, the compensation to be fixed by arbitration. This agreement contained a proviso that the compensation was not to be deemed to be paid in respect of any interest which *Seymour Phillips Allen* might lawfully claim to have in the said lands.

Until after the amount of compensation to *Nixon & Co.* was fixed at £12,560, by an award made on the 13th of October, 1862, Messrs. *Nixon & Co.* had concealed from the Company the clause as to compensation contained in their lease.

On investigating the leasehold title, this clause was discovered; and the title was accepted, and the draft conveyance by *Nixon & Co.* to the Company settled, subject to the question arising out of the reservation of compensation to the lessors. At this time *Seymour Phillips Allen* was dead, and the reversion had descended on his heir.

In reply to a notice served by the Company on the solicitors of the heir and also of the executrix of *Seymour Phillips Allen*, stating that the purchase of *Nixon & Co.*'s interest would be completed, and the compensation paid to them unless claimed by the heir or executrix, an answer was

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Statement.

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 WAY COMPANY
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 ———
Statement.

sent, to the effect that the heir (the Defendant *H. S. Allen*) claimed to receive the whole of the compensation. The executrix also claimed to have some interest under the compensation clause in the lease. The Company having refused to complete under these circumstances, *Nixon & Co.* threatened proceedings at law.

A further dispute had also arisen between *Nixon & Co.* and the Company, as to the amount to be paid for interest or occupation rent in consequence of the Company having taken possession of part of the land (without the formalities required by the Lands Clauses Act) before the agreement for the purchase of *Nixon & Co.*'s interest was completed.

This Bill was filed against Messrs. *Nixon & Co.* and the heir and executrix of *S. P. Allen*, praying a declaration what parts of the compensation were payable to the Defendants respectively; and that, on payment thereof to such Defendants, Messrs. *Nixon & Co.* might be ordered to execute the conveyance, and also that the Plaintiffs might be at liberty to pay into court (without prejudice) a sum sufficient to secure any sums ultra the amount awarded which might be found to be payable by them in respect of their occupation; and that thereupon the Plaintiffs might be let into immediate possession of the whole land. The Bill also prayed an injunction against *Nixon & Co.* to restrain proceedings at law, and that the costs should be paid by such of the Defendants as the Court should direct. An affidavit of no collusion was filed with the Bill.

To this Bill the heir and the executrix of *S. P. Allen* put in a joint demurrer for want of equity and multifariousness.

Argument.

Mr. *Giffard*, Q.C., and Mr. *Kay*, for the demurrer:—

On a Bill by a purchaser asking specific performance, (as this does against *Nixon & Co.*), no one but the vendor

can be made a Defendant: *Mole v. Smith* (a), *Tasker v. Small* (b). If the concurrence of any one else is required in the conveyance, all that the purchaser can do is to call upon the vendor to obtain it. The reason is plain. The stranger to the contract cannot enforce it against the purchaser; and if the purchaser could make him a Defendant, there would be no mutuality.

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Further, the Bill as against us is a bill of interpleader or nothing. It asks nothing against us but interpleader relief; and is accompanied by an affidavit of no collusion. As an interpleader bill, it is clearly bad, because the Plaintiffs claim an interest for themselves, and for other reasons: *Bignold v. Audland* (c).

As to the executrix, the only allegation as to her is, that she claims an interest under the clause in the lease, which is not sufficient to save a demurrer, where the other facts stated show that she is not a proper party.

Further, the Bill is multifarious; as a great part of the relief asked as to the occupation dispute, and otherwise, in no way concerns us; and we ought not to be mixed up with it.

Mr. Daniel, Q.C., Sir H. Cairns, Q.C., and Mr. Hemming, for the Plaintiffs, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

March 2nd.
Judgment.

I think in this case I must overrule the demurrer. I have always understood the rule in *Tasker v. Small* to apply to a person who claims an interest paramount to the contract, and not to one who mixes himself up with the contract, and makes himself a direct party to it by setting up a claim to some benefit resulting from it. As the case is stated in the Bill, the lessor

(a) Jac. 490.

(b) 3 My. & Cr. 63.

(c) 11 Sim. 23.

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 ———
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of the property, in dealing with his lessee, did not in the agreement for the lease reserve all the mineral rights, or anything of that nature. If he had done that, simply reserving something out of the lease, he would have been entitled to insist upon his rights against the Plaintiffs, and the Plaintiffs could not have brought him before the Court on a Bill like this. He could have stood on his independent rights. But instead of doing that, he says in effect, "I do not reserve to myself any description of property whatever, but I reserve to myself a share in all the moneys to be derived by way of damages, compensation, or the like, that you, the lessees, may obtain from a railway company." By doing that, the lessor elected to mix himself up with the subject matter of any contract which might be made between the lessees and such railway company. Then the lessor is informed that the compensation is about to be paid to the lessee; and he does not say that the lessee had been bargaining without authority for the sale of anything which was reserved out of the lease, but he adopts the bargain, and claims the compensation money. A claim so made is entirely different from claiming anything paramount to the contract. In effect it is an adoption of the contract; and he is brought here, not because specific performance is asked against him, for there is no prayer of that kind against him, but because he claims the money payable under this contract which has been entered into with the lessees, the persons who had been authorised to make the contract.

The Company file their Bill, stating that the lessor has given notice that he claims the whole purchase-money, whereas the vendor says that he is entitled, if not to the whole, at least to a part of it; and they add, that when they agreed to purchase they were ignorant of the provisions in the lease. In that state of things the case appears to me to be just that which is hypothetically put by Vice-Chancellor

Turner in Chadwick v. Maden (a), where, on a bill filed by a vendor against a purchaser and a person for whom the purchaser was supposed to have been acting, the Vice-Chancellor held that this last Defendant, having repudiated any interest under the original contract, was not a proper party, but added, "If he had claimed under the contract he would have been a proper party to the suit." In this case the lessor might have insisted on any rights which were reserved to him over the land, and have disclaimed any interest under the contract of his lessee; but instead of an interest in the estate, what he has claimed is an interest in the purchase-money. That demand having been put forward, I do not see how it could be determined without bringing before the Court the parties who gave notice of their claims. On the face of the Bill, no one appears to dispute the contract, but each party claims the whole of the money. I apprehend it is quite competent for persons, after a contract has been entered into, to set up a claim to the purchase-money, on the ground of some agreement with the vendor; but if they do so it is the proper course to bring them before the Court when the contract in which they claim an interest has to be adjudicated upon. No doubt it will be competent for the Defendants to disclaim at the hearing, and if that is done the whole difficulty will be removed; but in the meantime it seems to me that they adopt the contract by claiming an interest in the purchase-money, a circumstance which takes the case out of the rule laid down in *Tasher v. Small*. I must therefore overrule this demurrer.

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(a) 9 Hare, 190.

1863.

May 12th.

*Partnership—
Retiring Part-
ner—Surety.*

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract; and although after notice of the retirement the retiring partner is in a sense a surety (on the principle of *Oakeley v. Pasheller*) that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract.

Continuing partners under such a contract (which inter alia gave the firm the power of appointing an arbitrator in case of dispute) entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract: —*Held*, that this was not such a variation of the original contract as to discharge the retired partner.

OAKFORD v. EUROPEAN & AMERICAN STEAM SHIPPING COMPANY (LIMITED).

THE Defendants were a Joint-Stock Company, constituted under the Joint-Stock Companies Act 1856, and at the date of the next stated agreement the Plaintiff was a partner with *J. R. Croskey* and *J. H. Wolff*, in the firm of *Croskey & Co.*

The Company agreed with the *General Screw Steam Shipping Company* for the purchase of eight ships, at a price in cash amounting to £6 : 12 : 6 per share on all the shares in the *General Screw Company*, and the shareholders in the latter Company had the option offered to them of taking £6 : 12 : 6 per share on the amount of their shares in cash, or if they should assent to take payment in shares of the *European and American Company*, then to take payment at the rate of £9 of new shares for every share held by them in the *General Screw*. The difference between the cash payment of £6 : 12 : 6 and the share payment of £9 was the bonus of £2 : 7 : 6, hereinafter referred to.

On the 8th of April, 1857, an agreement was entered into between the Defendant Company and the firm of *Croskey & Co.*, who had already been acting on behalf of the Company. This agreement recited that the Company had purchased the eight ships, and had agreed with *Croskey & Co.* to undertake the management of the vessels on the terms therein set forth; and it was agreed, among other stipulations, as follows:—

1. "That such sums as the directors may think fit shall be laid out and expended on the said ships, so as to make the same fit for the purposes of the undertaking; after

which an account shall be made up, including the first cost of the vessels and the cost of their first repair and equipment, and the cost of taking them to the port of their first outward destination, which shall be considered as the capital account."

2—11. These clauses provided for the management of the ships by *Croskey & Co.*, who were to receive the earnings and provide for the expenses, and to render accounts of their outlay and receipts.

12. This clause provided for the remuneration of *Croskey & Co.* as follows:—Out of the earnings of the ships was to be deducted, first, working and other specified expenses, costs of repairs, a sum of £1000 per annum for a boiler fund for each ship, insurance expenses, "together with the sum of £5 per cent. per annum on the capital, to be ascertained as aforesaid, less the boiler fund to be set aside as a depreciation fund; and in case the balance of the said earnings shall be insufficient to pay the said Company a dividend after the rate of £6 per cent. on the amount of capital embarked, to be ascertained as aforesaid," then Messrs. *Croskey* were not to receive any payment out of the earnings, except an allowance of £500 a year for offices and clerks, and the brokerage on insurances; "but if the balance of such earnings, after such deductions as aforesaid, shall be more than sufficient to pay the said Company a dividend after the rate of £6 per cent. on the said capital," then the said Company were to pay or allow to *Croskey & Co.* one moiety of the excess in each year, provided that in such calculation no deduction should be made for the said allowance of £500 a year, nor on account of certain expenses of management which were to be borne and paid by the Company.

13. This clause provided that *Croskey & Co.* were to make all repairs which the directors should consider necessary.

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14. This clause provided that the agreement should continue in force for three years from the date, and for such further time as the net profits should admit of a dividend of £6 per cent., calculated as aforesaid, being paid to the shareholders: and power was given to either party to determine the agreement on six months notice after the 1st of June, 1858; but if the notice should be given by the Company while the £6 per cent. dividend should be divisible, *Croskey & Co.* were to be paid a commission of £6 per cent. on the gross earnings of the year preceding the determination of the agreement.

15. This clause provided, that, in the event of a determination by the Company before the expiration of three years, when the dividend should be less than £6 per cent., it was to be one of the subjects of reference under the agreement, whether *Croskey & Co.* were entitled to any and what compensation.

16, 17. These clauses provided for the event of an increase of capital and the purchase of additional ships, and also for the loss of ships and the receipt of insurance money, and for the event of a bankruptcy of *Croskey & Co.*

18. This clause saved *Croskey & Co.* from liability for any deviation from the agreement sanctioned by the directors, and excluded the existence of a partnership; and further provided that every difference should be referred to arbitrators, one to be chosen by the Company, a second by *Croskey & Co.*, their executors, administrators, or assigns, and the third by the two persons so chosen.

On the 22nd April, 1857, a report, which had previously been approved by Mr. *J. R. Croskey*, was presented at a meeting of the Company, which, after setting out an expenditure amounting to £403,380 : 7 : 7, stated that £227,661 : 10 : 0 was provided by the transfer and purchase

of 34,364 shares in the old Company, leaving £175,719 to be raised in cash, "to which," the report proceeded, "must be added the sum of £81,614 : 10 : 0 represented by the bonus of £2 : 7 : 6 on the 34,364 assentient shares, making the capital amount to £484,994 : 7 : 7, to the whole of which, under the agreement with Messrs. *Croskey & Co.* the preferential dividend of £6 per cent. applies." . . . "The terms of the agreement with Messrs. *Croskey & Co.* having been modified, so as to make the preferential dividend of £6 per cent. in favour of the shareholders extend to the additional capital, your directors feel that, in the interests of the Company, they have adopted the wisest and safest course."

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The Plaintiff personally took no part in the approval of this report.

On the 11th of July, 1857, the Plaintiff retired from the firm of *Croskey & Co.*, and ceded all his interest in the agreement to the continuing partners, who covenanted to indemnify him against all liabilities in respect of it.

Differences subsequently arose between *Croskey & Co.* and the Company, as to the accounts, the main dispute being, whether the bonus of £2 : 7 : 6 was to be included in the capital on which the £6 per cent. dividend was first to be paid. These disputes were settled by a memorandum made by a joint committee on the 7th of September, 1858, which provided that the bonus was to be included in the capital; that the principle of certain accounts rendered by *Croskey & Co.* was to be admitted; that certain other differences were to be submitted to Mr. *Brown*, as arbitrator for the Company, and Mr. *Jay*, for *Croskey & Co.*, who were to select an umpire, as provided in the agreement; and further, that the agreement between the Company and *Croskey & Co.*, was to be reconsidered, with a view to prevent the occurrence of differences.

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The memorandum was adopted by the Board of the Company, and carried out by an agreement between the Company and *Croskey & Co.*, dated the 21st of September, 1858. This agreement recited, that, since the agreement of the 8th of April, 1857, the Plaintiff had retired from the firm, and ceded his interest in the agreement to the continuing partners; and also recited differences in respect of the accounts rendered up to the 1st of June last, and that an arrangement had been come to on the 7th of September last, "for the settlement thereof by arbitration," pursuant to the provisions of the agreement of the 8th of April, 1857, and stipulated, among other things, to the following effect:—

1. That the memorandum of September, 1858, should be recognised as binding.
2. That the disputes as to the accounts should be referred, subject to the stipulations contained in the memorandum, to the arbitrators named therein.
3. That nothing therein contained should affect the arbitration clause of the agreement of the 8th of April, 1857, for reference of any differences other than those now referred.

On the 26th of November, 1858, the Company gave notice to terminate the agreement of the 8th of April, 1857, on the 1st of June, 1859.

On the 5th of April, 1859, the Company was ordered to be wound up by the Court of Bankruptcy.

On the 27th of January, 1860, by an order of the Court of Common Pleas, *Croskey & Co.* were allowed to revoke the submission of the 21st of September, 1858, by reason of an irregularity in the appointment of an umpire.

On the 10th of February, 1860, an action was com-

menced on the part of the Company against *Croskey, Wolff*, and the Plaintiff, was subsequently restrained by injunction on a Bill filed by *Croskey & Wolff* against the Company (a), on which an account was subsequently decreed.

The present Bill had been filed at the same time by *Oakford*, and charged that the Plaintiff, after his retirement, was a mere surety for the performance of the agreement of the 8th of April, 1857; and that, by the subsequent acts of the Company, he was discharged from all liability.

The prayer was for an injunction to restrain the action or any proceedings against the Plaintiff under the agreement of the 8th of April, 1857.

The cause now came on to be heard; a motion for injunction having been previously ordered to stand over to the Hearing.

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Sir *H. Cairns*, Q.C., and Mr. *Swanston*, for the Plaintiff:—

Argument.

It is settled law, that, when a partner retires from a firm and takes a covenant of indemnity, his liability for the engagements of the firm becomes that of a surety only; and any dealing, after notice of the retirement, by a creditor of the firm with the continuing partners, which would release an ordinary surety, will release the retired partner: *Evans v. Drummond* (b), *Hart v. Alexander* (c), *Oakeley v. Pasheller* (d).

That the Company in this case had notice of the retirement before the agreement by which they modified the

(a) 1 J. & H. 108.

(c) 7 Car. & P. 746; S. C. 2 M.

(b) 4 Esp. 89.

& W. 484.

(d) 4 Cl. & F. 207; 10 Bligh, 548.

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original contract is undeniable, the fact being recited in the agreement itself; and the only question is whether there has been such a modification of the original contract as would discharge an ordinary surety.

Not to mention other variations, there are two provisions in the agreement of September, 1858, which entirely alter the position of the contracting parties. One of these is the admission of the bonus as part of the capital, which had always been resisted by *Croskey & Co.* before the retirement of the Plaintiff, and was no part of the contract as properly construed. The other, was the appointment of an arbitrator, not by the three partners as provided by the original contract, but by the two continuing partners alone. Moreover, there is the express bargain that the contract should be remodelled.

Each of these variations amounts to the substitution of a new contract, and therefore discharges the surety: *Gardner v. Walsh (a)*, *Whitcher v. Hall (b)*, *Bonar v. McDonald (c)*, *General Steam Navigation Company v. Rolt (d)*, *Davies v. Stainbank (e)*, *Small v. Currie (f)*, *Pooley v. Harradine (g)*.

Mr. Daniel, Q.C., and Mr. Cotton, for the Defendants:—

The only notice we had was that the Plaintiff had retired. We did not know that he had been indemnified, and it might be that this particular continuing contract was carried on by the other partners as agents for themselves and the Plaintiff; and this, in the absence of further information, is the legitimate effect of a retirement pending a continuing contract, as to which the inferences of law

- (a) 24 L. J., Q. B., 285.
- (b) 5 B. & C. 269.
- (c) 3 H. L. Cas. 226, 239.
- (d) 6 C. B., N. S., 550.

- (e) 6 D. M. G. 679.
- (f) 5 D. M. G. 141.
- (g) 7 Ell. & B. 431.

are very different from what they would be in the case of liabilities which arose without any such continuing contract.

The authority of *Evans v. Drummond* is entirely disposed of by *Bedford v. Deakin* (a); and *Oakeley v. Pasheller* was a very different case from this. It is clear that no transaction between the partners can affect a creditor, except to the extent to which he has notice; and we had no notice of the indemnity which made the Plaintiff, as he says, a surety. But the contract, in fact, has not been varied. The stipulation that it should be remodelled was not acted upon. The arrangement as to the bonus was merely a submission by the continuing partners to the true construction of the original contract; and the settlement of matters of account was clearly a proceeding under and not in modification of the original agreement. The arbitration has fallen through, and is clearly no hurt to the Plaintiff; and if it were, it must be within the functions of the partners who have retained their interest and acquired that of the retiring member of the firm to appoint an arbitrator under the clause in the agreement of 1857, just as it would fall on them to carry out all the other details of the contract.

Even if the Plaintiff were a surety, there has been nothing done to discharge him, and a fortiori this is so when he is a retiring partner, who was originally a principal contracting party, and who by his retirement constituted his partners his agents for carrying the contract into effect.

Sir *Hugh Cairns* in reply.—We have not contended that mere retirement makes a partner a surety, but *Oakeley v. Pasheller* has settled that retirement on a covenant of indemnity does so. That being so, notice of the retirement is notice of the terms of it, and, among other

(a) 2 B. & Ald. 210.

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stipulations, of the covenant for indemnity. It was for the Company, knowing that the Plaintiff had retired, to ascertain how far the terms of the retirement might affect their position ; and if they did not choose to do so, they are bound by the consequences of their neglect. In fact, the notice proved here is fully as extensive as that which was held sufficient in *Oakeley v. Pasheller*.

Then as to the variation in the contract. If the addition of the bonus to the contract was not a variation, why were *Croskey & Co.* required to assent to it by a new agreement. The report which they rely on to show the construction of the original agreement is a mere matter between the directors and the Company ; and singularly enough, the report itself describes the allowance of the bonus as capital as a modification of the contract.

Then, again, as to the arbitration. A clause directing that *A.*, *B.*, and *C.* shall appoint an arbitrator, is not satisfied by a reference under which the appointment is made by *B.* and *C.* ; and this is another variation sufficient to discharge the surety.

Mr. Rolt, Q.C., *Mr. Giffard*, Q.C., and *Mr. E. F. Smith*, for the Defendant *Croskey*, took no part in the argument.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

In order to sustain the Plaintiff's contention, it would be necessary to give a very large extension to the doctrine of *Oakeley v. Pasheller*. That case determined that where a creditor had two joint principal debtors, and was entitled, if he found it convenient, to give time to the one and to press the other, an agreement between the debtors might so affect him as to deprive him of that right. That was a strong decision, and it went upon the footing that

the creditor having notice of the agreement was bound to regard it. The circumstances of the present case, however, do not admit of any comparison with those of *Oakeley v. Pasheller*.

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Three persons, members of a firm, bind themselves by a contract, which is to run over a period of three years. Before the date of this agreement there had been open accounts between the firm and the other parties to the contract. After a year, one of the partners retires, and takes a covenant of indemnity from the continuing partners, by whom the business is carried on. What was the effect of this? It is clear that the continuing partners were bound to go on with the performance of the contract, and that the partnership *quâ* that particular contract was still subsisting. What then was the effect of the retirement? Only this, that the retiring partner in substance constituted the continuing partners his agents for all the legitimate purposes of the contract, under which they were all liable for the residue of the term during which it was to remain in operation. That being so, the retiring partner is bound by every act done under the contract in conformity with it. This subsisting contract was in fact a distinct matter by itself, and none of the authorities cited, except *Oakeley v. Pasheller*, have any bearing upon the point. All those cases turned upon the adoption of a new debtor in place of the firm originally liable, whereas here the only question is whether any new contract was in fact entered into by the two continuing partners after the Company had had notice of the retirement of the third from the partnership generally, although, as I have said, it was not in his power to withdraw from the continuing contract.

What took place was this: Disputes having arisen as to the effect of the contract between the Company and the three original partners, an agreement was executed for the purpose

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of adjusting the difference. This document recited that *Oakford* had retired from the partnership and ceded all his interest in the contract to *Croskey & Wolff*, and then recited that an agreement had been come to for settling certain differences by arbitration pursuant to the provisions of the contract of the 8th of April, 1857. This agreement went on to provide that *Croskey & Co.* should consent to the bonus being included in the capital, that the principle of their accounts should be admitted, and that on this footing all remaining differences should be submitted to certain arbitrators named by the Company and the then firm of *Croskey & Co.* It is clear that the arrangement was not meant as a new agreement, but as a record of the consent of *Croskey & Co.* to the Company's view of the original contract on the disputed question as to the addition of the bonus to the capital bearing the preferential dividend of £6 per cent., and also as a reference under the original contract. I was at first struck with the argument that the adoption of the term as to the bonus was a new engagement on the part of the contractors; but when I find that the Company throughout insisted on this construction of the original contract, and that *Croskey & Co.*, who had disputed it, ultimately agreed by this memorandum that the contract should be read in the sense which the Company put upon it, it would be carrying the doctrine of *Oakeley v. Pasheller* very far to hold that such a concession of a disputed point of construction with a view to avoid litigation amounted to a variation of the contract, which could not be made after the retirement of one of the members of the firm. Suppose that upon some trifling dispute between the continuing partners and the Company one party were to say, "We agree to take it that you are right and we are wrong," am I to hold that the retired partner would ipso facto be discharged because a point in dispute had thus been settled, it might be in his favour? But in truth, when the facts are examined, they do not

even raise this point; for I think that the chairman of the Company was right in his view of the contract, and that there was no concession at all. He has sworn that the intention was that the bonus should be added to the capital; and the report of the 22nd of April, 1857, to which he refers to assist his memory, strongly confirms this view. The principle of the agreement was, that the preferential dividend should be paid on the capital to be expended by the directors, including the first cost of the ships. But these ships were acquired by an arrangement with the old Company, and the bonus was in substance part of the cost. Accordingly, in the report referred to by Mr. *Crawford* as having received the assent of Mr. *Croskey*, it is expressly stated that the preferential dividend applies to the bonus no less than to the other outlay. The next clause, it is true, speaks of the agreement having been modified so as to make the preferential dividend extend to the additional capital; but taking the whole report together it is obvious that this sentence pointed to modifications introduced pending the treaty before any agreement was concluded, and there is no trace of any subsequent modifications having been made before the date of the report. I am of opinion, therefore, that when all the facts are regarded, this additional sum does properly come within the designation of the first cost of the vessels.

Even, therefore, if *Oakeley v. Pasheller* could be strained so far as to say, that after notice of a retirement the remaining partners cannot waive any point in dispute on a continuing contract of this kind without the retiring partner being released, I should still be of opinion that nothing has been waived which could have been maintained with success.

Another point was made as to the arbitration, and it was said, that the selection of an arbitrator by the continuing partners alone was a departure from the terms of the

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original contract. But this arbitration was only a mode of giving effect to the terms of the original contract, which it was quite proper for the continuing partners to adopt; and without saying that they were bound to refer any question, they were clearly discharging their duty properly in doing so.

When two persons are of necessity left to work out a contract on which another is jointly liable with them, can it be said that the whole contract becomes void against the third partner, because those who are left to act in the business do, by referring a dispute, act in the very way prescribed by the original contract? It is clear that the retiring partner must be taken to have handed over to them, as his agents for carrying out the contract, the power of appointing an arbitrator in case of a difference arising.

The agreement of the 21st of September is said to have fettered the arbitrators in a manner not in accordance with the original contract; and it amounts no doubt to this, that the arbitrators would be bound to adopt the concession (if concession it was) on the subject of the bonus; and also the concession on the part of the Company as to admitting the principle of *Mesars. Croskey & Co.'s* accounts.

The result, however, is, that the so-called variation is nothing more than an agreement in pursuance of the original contract by which *Oakford* is bound. I cannot push the doctrine of *Oakeley v. Pasheller* to such a length as to relieve the Plaintiff under such circumstances; and the Bill must therefore be dismissed with costs.

SIMPSON v. FOGO.

THIS case, reported on demurrer, 1 J. & H. 18, now came on upon motion for decrea.

By an indenture dated September 25th, 1854, Messrs. *Klingender*, carrying on business at *Liverpool*, and then the sole owners of the *British* ship *Warbler*, which was duly registered at the port of *Liverpool* in their names, mortgaged the ship (then at sea) and all freight on any present or future voyage, to a trustee for the Bank of *Liverpool*, for a balance then due to the Bank, and for future advances. This mortgage was duly registered at *Liverpool* on the 2nd October, 1854. On December 4th, 1857, the mortgagors stopped payment. The ship was then on a voyage to *New Orleans*, where she arrived about the 21st of December, 1857, then being in charge of the master and crew put in by Messrs. *Klingender*.

On January 6th, 1858, Messrs. *Hughes & Co.*, citizens of *Louisiana*, and creditors of Messrs. *Klingender*, who commenced an action in the Fourth District Court of *New Orleans* against Messrs. *Klingender* for the recovery of their debt, applied for, and obtained from the said Court upon the affidavit and bond required by the law of *Louisiana*, a writ of attachment dated January 6th, 1858, directed to the sheriff of the parish of *Orleans*, and commanding him to seize and attach according to law and take into his possession the goods, chattels, and effects of the Defen-

judgment, that the law of *Louisiana* did not recognise transfers of property in chattels without delivery of possession, that to admit the claim would be prejudicial to the citizens of *Louisiana*, and that the comity of nations did not extend to the case. The ship was then sold, under a writ in the nature of a *f. fa.* in the action, to the Defendant in this cause, and the proceeds were applied in favour of the creditors to the exclusion of the mortgagees. The ship having been brought to *England*, the mortgagees, whose debt was admitted to exceed the value of the ship, filed his Bill to establish his claim.

Held, that the judgment of the Court of *Louisiana* was examinable for error on the face of it by reason of its disregard of the comity of nations, and that the mortgagee was entitled to the ship.

Held also, that the judgment was of the nature of a judgment inter partes as regarded the intervenor; but

Seemle, that a foreign judgment even in rem may be examined and disregarded, if it appears on the face of it to have been founded on a perverse disregard of *English* law in a case properly subject to that law by the comity of nations.

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December 9th.
1863.

Feb. 13th.

Foreign Judgment—How far examinable—*Lex Loci*—Comity of Nations.

A *British* ship was duly mortgaged in *England*, and remained in the possession of the mortgagor, who afterwards sent her to *New Orleans*. There she was attached by a citizen of *Louisiana*, a creditor of the mortgagor, in an action commenced for the recovery of his debt, not being a proceeding in rem. The mortgagee intervened in the action, and claimed possession of the ship. The Supreme Court of *Louisiana* refused to recognise his title, though good by the law of *England*, assigning as a reason, on the face of the

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dants in the action, if any, in the said parish, to an amount sufficient to discharge the Plaintiffs' debt and costs.

On the same day the sheriff seized the *Warbler*, and served a copy of a notice of seizure, addressed to the captain and owners, upon the master of the ship.

On the following day *Hughes & Co.* filed a petition in the said action, stating their debt at 14,520 dollars, and prayed that the Defendants might be cited and condemned to pay the amount, and that in consideration of the said affidavit and bond the attachment issued as aforesaid might be sustained and supported for a privilege on the property attached.

On January 11th an order was made by the said Court that a writ of attachment should issue in the cause, the Plaintiffs therein giving bond with good and solvent security according to law. On the same day Messrs. *Hughes & Co.* executed a bond in the said action to Messrs. *Klingender* in the sum of 24,000 dollars, to secure all damages which might be recovered against them in case the attachment should prove to have been wrongfully obtained; and a second writ of attachment thereupon issued, under which the sheriff levied on the ship already in his possession under the writ of January 6th.

By the law of *Louisiana* any person claiming an interest in property seized under any legal process is at liberty to intervene in the suit in which the writ has issued; and it appeared from the evidence of Mr. *Bradford*, a *New Orleans* advocate, that in the absence of any intervention by a third party in a suit of this description, any rights he might have would be unaffected by the proceedings therein; but that if he intervened, his rights would be adjudicated upon, and he would (according to the law of *Louisiana*) be as completely bound as if he had voluntarily commenced the suit as Plaintiff. Mr. *Bradford* also stated in effect,

that, by the law of *Louisiana*, persons in possession of a ship as owners were for all purposes deemed to be the true owners.

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The Bank of *Liverpool*, before hearing of the proceedings in the action at *New Orleans*, had sent out instructions to their agent, Mr. *Mure*, (who was the *British Consul at New Orleans*) to take possession of the ship by virtue of their mortgage.

On January 15th, 1858, *Mure*, on behalf of his employers, intervened in the action. His petition for this purpose, after stating the title of the mortgagees, and his own authority to take the possession and control of the ship, alleged that the ship had been wrongfully seized, traversed the declarations of the Plaintiffs in the action, and prayed that they might be cited to appear and answer the petition, that their petition might be dismissed, and that the possession of the ship might be ordered to be given up to him (*Mure*) on behalf of the mortgagees, with costs of suit, and reserving the right to sue for damages.

Before this petition came on to be heard in the Fourth District Court, several other writs of attachment had been issued against the ship by creditors of Messrs. *Klingender*, some of whom claimed a privilege on the ship by reason of the character of their debts; such privilege, according to the law of *Louisiana*, signifying a right of satisfaction in priority to all mortgages or other claims.

By the *Louisiana* code, creditors holding such privileges are entitled to follow the ship in the hands of a voluntary purchaser, but in the case of a forced sale under process of law, only to follow the purchase-money, the purchaser in that case taking an irrevocable title to the ship.

The code of *Louisiana* confers such privileges in the following order:—1. Legal and other charges in and about the sale of a ship; 2. Debts for pilotage, wharfage, and

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anchorage; 3. Expenses of keeping a vessel until sale; 4. Cost of warehousing stores; 5. Maintenance of ship; 6. Wages of captain and crew on the last voyage; other charges following in a certain prescribed order.

By an arrangement between all parties concerned, it was agreed that *Mure* should pay certain wages which were due to the crew, and should stand in the shoes of the crew in respect to their privilege on that account, *Mure* acting in this matter not as the agent of the Bank but as *British Consul*.

On January 18th, *Mure* made an interlocutory application for a rule to show cause why the ship should not be delivered to him on his giving a bond to produce the ship or the value thereof, to abide the final determination of the litigation; and on January 18th, 1858, a rule was granted on this motion, reciting the facts as they were stated in the petition, and reciting that *Mure* had intervened in the suit on behalf of the Bank of *Liverpool*; that the detention of the ship in the custody of the law caused great expense; and that it was for the interest of all parties concerned that in the meantime some disposition should be made of the ship, so as to save expense, without prejudice to the ultimate rights of the contestants; and it was ordered that the parties claiming to be creditors of Messrs. *Klingender*, and their curator ad hoc (an attorney appointed by the Court to represent the Defendants in consequence of their residing out of the jurisdiction,) should show cause why the ship should not be appraised and delivered to *Mure* in his capacity aforesaid, on his giving a bond with surety, conditioned to produce the ship to abide the decree of the Court, or be responsible for the value thereof upon the final determination of the litigation.

On January 21st, *Mure* presented another petition of intervention, claiming privilege in respect of the sums so paid, as before stated, for wages.

On January 22nd, the rule of the 18th of January came on for argument, when it was made absolute so far that the parties should, within twenty-four hours, name the respective appraisers to value the ship.

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On the 5th of February, 1858, the rule came on for final hearing, and was dismissed with costs. The written opinion of the Court, which was filed with the judgment, was to the following effect :—

“ This is a rule taken by *William Mure*, agent of the Bank of *Liverpool*, intervening in this suit and claiming the property, to shew cause why he should not be permitted to bond the property herein seized. By the Act of 1852, page 155, amendatory of the 259th of C. P., the Defendant may, in every stage of the proceeding, have the property released upon delivering to the sheriff his obligation for the sum exceeding by one-half the value of the property attached, &c. There is no law authorising an intervenor who claims the property attached to give such bond as the Defendant can under Article 259, C. P. The case of *Park v. Porter*, 2 Rob. 344, presents a different state of facts from the one at bar. In that instance, the goods were consigned to a party who had made advances on them, and was in possession of a bill of lading, which is *prima facie* evidence of ownership, and as such was entitled to the possession of the property seized. But the instrument by which the Plaintiff in this rule has offered to prove title to the property seized, and the possession thereof, is nothing more than a mortgage. The mortgagee is not entitled to the possession of the property mortgaged; his right is to be paid by preference out of the proceeds of the sale of the mortgage property. For the reasons assigned, it is ordered, adjudged, and decreed, that the rule taken herein by *William Mure*, on the 18th of January, 1858, be dismissed with costs.”

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On February 6th, *Mure* moved for a new trial of the rule, but the motion was ultimately dismissed with costs by the Fourth District Court, on April 26th.

Various other interventions took place in the suit, on the petitions of the captain, the crew, stevedores, and other persons who claimed privilege in respect of the sums due to them on account of the ship.

On July 16th, the Plaintiffs in the action obtained a rule that the Defendants and the intervenors should shew cause why the ship should not be sold, on the ground of the deterioration and expense occasioned by keeping her in the custody of the law; but the rule was dismissed with costs, on June 26th, on the ground that an appeal was pending from the judgment refusing permission to *Mure* to bond the vessel.

On September 6th, judgment was given in the action (*Mure* appearing on the hearing), by which the debt of Messrs. *Hughes & Co.* was established; and it was ordered "that the rights of all the intervenors should be reserved for further adjudication thereafter, as well as the question of privilege and rank of attachment to be established contradictorily in a concurso between the parties having claims against the Defendants."

On January 4th, 1859, the cause came on before the Fourth District Court, on the petition of intervention of *Mure*, of the 15th January, 1858; and on January 26th, the intervention of the Bank of *Liverpool* was ordered to be dismissed with costs. The reasons filed with this judgment were as follows:—

"Reasons filed January 26th, 1859.—The Bank of *Liverpool*.—The Bank of *Liverpool* claimed the ownership and possession of the ship *Warbler*, attached by Plaintiffs in this suit as the property of Defendants. I regard the document relied on by the opponent as a mortgage for the security of a debt, and not as a bill of sale of the ship.

The instrument being regarded in this light, it follows that the opponent is a mortgage creditor and not an owner. The able and ingenious argument of opponent's counsel is fully answered by the cases reported in 7th L. R. 490, 17 L. 158, 2 Rob. 35, 4 Rob. 345, 6 Rob. 127, 11 An. 702, and, 12 An. P. 521. It is therefore ordered, adjudged, and decreed, that the petition of intervention and third opposition of the Bank of *Liverpool* be dismissed with costs."

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Mure's appeal from the order of the Fourth District Court of February 5th, 1858, dismissing the rule as to bonding, was heard on appeal by the Supreme Court of *Louisiana*, before the Chief Justice and three associate Justices, and judgment was given on January 31st, 1859, as follows :

"The Plaintiffs and others having attached the ship *Warbler*, of *Liverpool*, *William Mure*, as agent for the Bank of *Liverpool*, through his counsel, has taken a rule upon all parties to show cause why he should not be authorised to take the ship into his possession during the pendency of this litigation, upon giving bond. He bases his application upon the allegation that during the litigation in these cases great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in *Liverpool, England*, for the security of the Bank, by which the ship is conveyed to *Joseph Langton* in trust, with authority to sell and pay the Bank. The intervenor relies upon the cases of *Park v. Porter*, 2 Rob. 344, *The Ohio Insurance Co. v. Edmondson*, 5 L. R. 296, and Article 21 C. C. in support of the motion. The instrument produced by the Bank of *Liverpool* does not purport to convey the ship to the Bank, but to a trustee; the Bank is therefore not the owner. At common law, the instrument, we suppose, would be considered as between the

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parties at least to convey the legal title in the ship to *Langton*. The only rights the Bank of *Liverpool* could have would be a right in Chancery to enforce the execution of the trust. Hence the most favourable footing on which the claim of the intervenor can be placed is that of a creditor with a privilege; he has therefore no right to the possession of the property, and must enforce whatever rights he may have upon the proceeds, precisely as the attaching creditors are compelled to do. The law confers upon the Defendant only, the right to set aside the attachment, by giving bond: C. P. 259, Art. 1852, p. 165—it is not conferred upon the creditors. It is true the Courts have allowed, under an equitable construction of the article, an intervenor having possession and claiming to be owner, to bond in order to avoid the great injury which third persons might suffer by the unjust seizure of their property. We see no reason to adopt a construction which shall confer this right upon creditors, particularly as the legislature has recently revised the article of the Code of Practice without extending it to other persons than Defendants. It is therefore ordered, adjudged, and decreed that the judgment of the Court below be affirmed with costs."

On February 12th, a writ of *fi. fa* was issued on the judgment in the cause, by which the sheriff was commanded "by seizure and sale of the property, real and personal, rights and credits" of Messrs. *Klingender*, to levy the Plaintiffs' debt and costs.

On March 4th, 1859, the cause came on for distribution of the proceeds (*Mure* being represented), when, it appearing that the ship had not been sold, the cause was continued indefinitely.

The vessel was put up for sale by auction under the writ, on the 22nd of March, 1859, when the present Defendant, *Fogo*, by his agent, became the purchaser for 6,100 dollars;

and on the same day a bill of sale was executed according to the law of *Louisiana*, and the purchase money paid.

Mure, as the *British* Consul at the port, thereupon granted his certificate, that the vessel was duly sold in accordance with the law of the said State.

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The sheriff having made his return to the writ, the cause came on again before the Fourth District Court, on June 17th and 18th, for distribution of proceeds; and *Mure* was represented at the hearing, and claimed to be entitled to the proceeds in priority to the Plaintiffs in the action.

On January 13th, 1860, the appeal of *Mure* from the decree of the Fourth District Court, of January 26th, 1859, dismissing his petition of intervention, was heard and dismissed by the Supreme Court of *Louisiana*. The Chief Justice and four associate Justices were present. The judgment was as follows :—

“ This cause was before us in January last, on the question of the right of the intervenor to bond the property attached, 14 Annual. In the present case, the Bank of *Liverpool*, as vendee and trustee, claims the legal title of the ship. The petition of intervention was dismissed on the trial in the lower Court, and the intervenor appeals. The case merits, perhaps, a synopsis of the instrument upon which the intervention is founded. It (the instrument) is of great length, and is under seal; it is signed by the Defendants alone, and purports to have been executed on 25th day of September, 1854, in consideration of 5*s.*; and, to secure the Bank of *Liverpool*, *Klingender Brothers* nominally sell to *Joseph Langton*, Chief Manager of said Bank, his executors, &c., the ship *Warbler*, in trust that the same may be a continual security to the Bank for the payment of costs, and for all sums of money due or to become due by said *Klingender Brothers*, and for loans, &c. Another clause authorises *Langton*, the trustee, to sell the ship; and directs him to

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apply the proceeds first to costs ; second, to amount due the Bank ; and third, remainder to *Klingender Brothers*. Another clause obliges the trustee on satisfaction of the trust to reconvey. The instrument contains other covenants on the part of *Klingender Brothers*, warranting title, relative to Policies of Insurance, &c., &c. The instrument is no doubt executed in conformity to the Act of Parliament and the *English* law—see *Abbott on Shipping*, pp. 29 and 30, ed. 1854. Under that law, the intervenor would have been able in the *English* Courts to protect himself against subsequent purchasers and creditors, and the effects of bankruptcy. If it be admitted that the intervenor has such rights upon the ship by the *English* law, the question naturally arises, why are not those rights entitled to be respected in *Louisiana*, particularly as all parties to this controversy have their domicile in *England*, &c. It is not surprising that the question is repeated, and that the Courts are again and again called upon to answer it. The comity of nations extends only to enforce obligations, contracts, and rights, under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises. The instrument offered in evidence has no analogy to any mode known to our law of affecting personal property for the security of debts. It purports to sell to one man to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale nor a pledge ; for there is no delivery which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens, if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws. In the case of *Malcom v. The Schooner Henrietta*, this Court refused to recognise a mortgage upon a ship executed in the form of a conventional mortgage under our law, and declared that our law only admits of the hypothecation of

ships according to the laws and usages of commerce, 7 L. R. 488, lb. 486. In the case of *Grant v. Fiol*, it was again declared that instruments in the form of conventional mortgages on ships or vessels conferred no right or privilege whatever: 17 L. R. 160. The same doctrine was reaffirmed in *Hill v. Phoenix Two Boat Company*, 2nd Robinson, 35, in which the Court mentions, as the only valid hypothecation, that made to secure the necessary supplies for ships which happened to be in distress in foreign ports, where the masters and owners are without credit; if assistance could not be procured by means of such instruments, the vessels and their cargoes must perish. The subject was again fully considered in the case of *Harned v. Churchman*, 4 Annual, 312; and it was there said, 'It is the duty of Courts in all commercial nations to extend the rule of national comity to bottomry bonds and such other maritime hypothecations as are recognised by the general assent of the commercial world. But the public policy of recognising implied hypothecations or liens, as following property from foreign countries, may well be questioned. In the case of *Wickham v. Levistones* the effect of a common law mortgage executed in *Cincinnati*, and registered in accordance with the Acts of Congress, was considered, and this Court refused to give it effect because such a mortgage is not recognised by our laws:' 11 Annual, 702. In the case of *The Succession of Broderick*, 12 Annual, 532, we refused likewise to give effect to an act purporting to be a mortgage of a steam-boat, which was executed in this city, and recorded in the office of the Collector of Customs, under the Act of Congress of 29th July, 1850 (9th Statutes at Large, p. 440). In the case of *Swasey & Co. v. Steamer Montgomery*, 12 Annual, 800, we refused to recognise a privilege created by the law of *Alabama* for tolls for passing a certain channel; and we then announced the general doctrine that privileges must be regulated by the law of the forum, and that none can be

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claimed except such as are given by the civil code and statutes amendatory thereof. See also on this subject *Abbott on Shipping*, Edition 1854, p. 156, and note 2, and authorities there cited; see also a similar case, stated by *Savigny*, 8 volume, pp. 196, 197, sec. 368, Berlin edition, C. C. 3,204. No. 7; 19 Howard, 22 and 82. It may also be remarked that the hardship of the rule adopted by the Courts is not so great, when it is considered, that, in case of ships, it usually happens that the parties holding liens and mortgages in the home port have had the opportunity of enforcing the same, and have voluntarily permitted the ship to depart without so doing. It may be also further remarked, that the statute of 1858, p. 111, bans privileges upon ships after the lapse of six months. But in this case, it is contended by the intervenor's counsel that the instrument is assimilated more to a *vente á réméré* of our law than a mortgage, and may be upheld by our Courts in this form. The *vente á réméré*, like any other sale, is perfected as to third persons in the case of moveables by delivery, (which is wanting in the instrument under consideration), and the vendee becomes the owner of the fruits and the property absolutely, if it be not redeemed at the term stipulated. Here, *Langton*, so far from being owner, and making the fruits his own, had only authority as an agent to sell for the payment of debts; *Klingender Brothers* had received no serious price, and had nothing to return as such, C. C. 2,414 and 2,439. The instrument cannot therefore be viewed in any other light than as a security for money. There is a prayer on the part of the appellees, for an amendment of the judgment in their favour against the intervenor, so that the same shall be considered final. In order to avoid all doubt as to the effect of the judgment rendered, we will make the amendment. It is therefore ordered, adjudged, and decreed by the Court, that the judgment of the lower Court be so amended as to reject and bar the demand in intervention

and third opposition of the said Bank of *Liverpool*; and that said judgment so amended be affirmed, the appellants paying the costs of appeal."

There is no further appeal in *Louisiana* from the judgments of the Supreme Court.

On March 7th, 1860, judgment was given by the Fourth District Court on the question of distribution of the proceeds of the sale, and thereby the claims of certain intervening creditors entitled to privilege under the code of *Louisiana* (including *Mure's* claim for wages,) were allowed, the intervention of *Mure* as agent for the Bank of *Liverpool* was dismissed with costs, and the balance of the proceeds after payment of the privileged debts was ordered to be paid to the Plaintiffs in the action in part satisfaction of their debt, which was of greater amount.

The proceeds of the sale were applied accordingly.

The Defendant *Fogo* sent the ship with a cargo of cotton to *Liverpool*, where she arrived on March 22nd, 1860, and on that day the ship was registered at *Liverpool* in his name as sole owner.

The amount due on the mortgage to the Bank exceeded the value of the ship and freight. The Bill filed by the Public Officer of the Bank alleged that the Defendants, the consignee and the captain of the ship, intended to pay the freight already accrued to the Defendant *Fogo*, and that *Fogo* intended to dispose of the ship and send her away from *Liverpool* without regard to the claims of the Bank, and prayed an injunction to restrain the Defendants from allowing the ship to leave *Liverpool*, and from dealing with her without the consent of the Bank, and also from collecting the freight; and that a receiver might be appointed to collect the freight. Declarations were also prayed that the

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Bank of *Liverpool* was entitled to the ship and freight, subject only to any disbursements properly payable thereout.

Argument.

Sir *Hugh Cairns*, Q.C., Mr. *C. Hall*, and Mr. *Milward* (of the common law bar), for the Plaintiff:—

The sole point which arises now is that which was decided on the demurrer, whether the judgment of a *New Orleans* Court, founded upon a refusal to regard the *lex loci contractus*, under which the Bank had acquired a valid title in *England*, can be regarded as conclusive in this Court. A parallel case would be this:—If the judges of *Louisiana* chose to disregard every will which was not holograph, would this Court consider itself bound by a judgment rejecting an *English* will by a domiciled *Englishman* executed in accordance with our law? Since the decision in our favour upon the demurrer, the position of the authorities has been changed, but not so as to affect the conclusion then arrived at.

Castrique v. Imrie (a) has been reversed, and I shall have occasion presently to refer to the decision of the Exchequer Chamber. But before doing so I will briefly notice some other authorities, and I will first consider what is laid down by the leading *American* jurist, Mr. Justice *Story*, in his “Conflict of Laws.”

In section 102 he states the well-known rule, that contracts will in general be governed by the *lex loci contractus*, and cites a judgment from which it appears that at that time the doctrine was accepted by the Courts of *Louisiana*. Then in the following sections he proceeds to discuss exceptions from the rule, which however have no application to a case like the present. For instance, he,

(a) 8 C.B., N. S., 1; S. C. on app., Id. 405.

considers the influence of the law of domicile, which need not be discussed here, inasmuch as both the mortgagors and the mortgagees were domiciled in *England*, and the *lex domicilii* was therefore identical with the *lex loci contractus*.

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In sections 322 and 323, *Story* discusses the validity and priority of liens, referring the validity generally to the *lex loci contractus*, but leaving the question of priority to be governed partly by the *lex loci rei sitæ* or the *lex fori*. This case, however, is not one of mere priority attached to a conventional right, but a question of validity simply, because the bill of sale, if its validity is admitted, gives the absolute property, and therefore excludes any question of conflicting priorities.

Then in section 386, *Story* states the peculiar rule which the Courts of *Louisiana* have adopted. By their law, delivery is essential to pass title to a chattel as against creditors, and they have so far set at naught the comity of nations as to insist on applying this rule to foreign contracts, to the exclusion of the *lex loci*; and in sections 387, 390, the reasoning by which this course is attempted to be supported, is extracted from a judgment of the Supreme Court of *Louisiana*. Mr. Justice *Story* then proceeds to comment on this doctrine, and pronounces it inconsistent with the universal rule. The precise point raised in that case does not occur here, because there the contest was between the law of the foreign domicile, and the *lex loci rei sitæ*, and this does not touch our case, inasmuch as the ship was not in *Louisiana* at the date of the bill of sale.

It being clear, therefore, according to *Story's* view that the law of *England* ought to have been applied by the Courts of *Louisiana*, the only remaining question would be as to the effect of a judgment based upon rejection of the *English* law under the circumstances of this case.

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And upon this it is clear, in the first place, that this is not a judgment in rem, and that in cases in the nature of foreign attachment proceedings in personam will not be binding on the party unless the Court had rightful jurisdiction over the res and also over the persona—sect. 592 a. These being the doctrines laid down by Mr. Justice *Story*, let us now see what are the principles of our own Courts.

Upon the argument on the demurrer (a), the law was fully discussed, and your Honour stated the principles which governed the case, laying it down that if the averments of the Bill amounted to this, that the Courts of *Louisiana* founded their judgment on a total disregard of the *English* law—the *lex loci contractus*—such a judgment, which your Honour considered as not being a judgment in rem, could be examined here for error on the face of it, and would not be binding on an *English* Court.

The same doctrine has been laid down even in the case of a judgment in rem: *Dalgleish v. Hodgson* (b); though it is not necessary for our case to carry it so high as to say that a judgment in rem may be disregarded for error on the face of it. To the same effect are *Reimers v. Druce* (c), and *Don v. Lippman* (d). It is attempted by the Defendants to give to the proceedings the colour of proceedings in rem. They say that the sale was at the instance of persons holding liens. But this was not so, and the sale was in fact under a *fi. fa.* equally applicable to any other goods of Messrs. *Klingender*, and in a suit which was a mere personal proceeding against them. It is true in a sense that we intervened, but merely to protect our interests, protesting at the same time that the Court had no jurisdiction to meddle with the ship. The judgment therefore cannot be put so high against us as a judgment inter

(a) 1 J. & H. 18.

(b) 7 Bing. 496.

(c) 23 Beav. 145.

(d) 5 Cl. & F. 1.

partes in a suit in which we were Plaintiffs. The writ under which the sale took place did not differ in any way from a *fi. fa.*, except that it included lands as well as goods, which it would not have done in *England*. That the proceedings were in no sense in rem is clear from all the authorities collected in the note to *Duchess of Kingston's case*(a); and those authorities also establish the proposition that a foreign judgment (even in rem and a fortiori inter partes) is examinable for error on the face of it, such as repudiation of the *lex loci contractus* in the present case.

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In *Castrique v. Imrie* (b) the proceeding was against the ship, and clearly in rem; and the Court of Exchequer Chamber was of opinion that there had been no intentional disregard of *English* law. In *Cammel v. Sewell* (c) the Court of Exchequer intimated that the proceedings were "in the nature of" proceedings in rem (whatever that may mean) that by the law of *Norway* the master had power to sell, and that the purchaser was not bound to see to the propriety of the sale. In the Exchequer Chamber (d) the case was put on a different ground, namely, that the sale was authorised on the ground of agency, whereas here it cannot be said that the sheriff was either the express or implied agent of the Bank of *Liverpool*. That case therefore does not touch the old established principles on the subject. [They also cited *Burge's Commentaries* (e).]

Mr. Giffard, Q. C., Mr. Mellish, Q. C., and Mr. W. F. Robinson, for the Defendants:—

Three main questions present themselves for consideration:—1. Is the law of *Louisiana*, as it appears on the face of the judgments in this case, necessarily absurd? 2. Did the property in the ship pass by the sale to *Fogo*? 3.

(a) 2 Smith's Leading Cases, 683.

(b) 8 C. B., N. S., 405.

(c) 3 H. & N. 617.

(d) 5 H. & N. 728.

(e) Vol. 3, Part 2, Ch. 20, p. 763

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Are the Plaintiffs bound by the fact of their intervention in the suit?

On the first point it is clear that there is no such inherent absurdity in the rule of law adopted by the Courts of *Louisiana* as to deprive their decisions of the conclusive weight, which, according to the comity of nations, the Courts of this country allow to foreign judgments. Their principle is, that a mortgagor suffered to retain possession of a ship or other chattel shall, as between himself and his creditors, be treated as the true owner. Is this absurd? Why, it is the very principle adopted by our Legislature in the Factors' Act and in the Bill of Sales Act, and in the order and disposition clauses of the Bankruptcy Statutes. The characteristic difference between *English* and foreign law is, that we have applied a sound principle to isolated cases, while in *Louisiana* and elsewhere the principle is consistently applied in all its breadth. Property in a chattel, they say, shall not pass without delivery of possession, and it would be difficult to dispute the wisdom of the rule. With respect to ships which traverse the whole globe, the prudence of such a rule is especially manifest. It was the rule in *England* until the passing of the Merchant Shipping Act, because a mortgage formerly required indorsement on the registry to give it validity. Now this is not needful in the case of a ship at sea, which is in consequence allowed to sail with a certificate, which describes no person as owner, when the property, according to our notions, has passed to another. The doctrine, however, which we have repudiated, is still the rule of every other country in the world, and this deserves to be gravely considered before charging the law of *Louisiana* with absurdity because it has not followed our law in departing from the universal practice.

If the judgments of these Courts are not to be condemned for palpable absurdity on the face of them, I come to another question: Is there anything in the law of

nations to bind the Courts of *Louisiana* to reject their own rule and to follow ours? It is not disputed that an enactment on the principle of our order and disposition clause is quite consistent with international comity. And yet what is the effect of that? A foreigner acquires, by a foreign contract, a good title to chattels remaining in the hands of an *Englishman*. The *Englishman* becomes bankrupt, and immediately our Courts disregard the title acquired by the foreigner, though by an act valid and indefeasible according to the law of his domicile, or, it may be, to the *lex loci contractus*, and hand over the property to the bankrupt's assignees. What is the difference between this and the action of the judicature of *New Orleans*?—None whatever, except that we proceed on an isolated rule, and they on a general principle of which that rule is a fragment. The maxim that every sale requires delivery to complete it, does away with the necessity for a reputed ownership enactment in the special case of bankruptcy, because it renders all secret sales impeachable, just as some secret sales are impeachable here. The only way in which *Louisiana* can protect her citizens against secret dealings is by administering to foreigners the same law which applies to natives. If an *English* mortgagee finds himself in consequence in a worse position than he would be in at home, it is his own fault for allowing his ship to go within a foreign jurisdiction. And it is material to observe, that, even by *English* law, a mortgagee has not that indefeasible right which the Courts of *Louisiana* are charged with overriding. He may be defeated by maritime liens created by the servant of his mortgagor, as in the case of bottomry, or in respect of damage by running down another ship. So there was the common law lien for repairs overriding the claims even of mortgagees: *Williams v. Allsup* (a). In addition to these various risks, he also runs the hazard of finding the vessel subjected to a foreign law, which may

(a) 10 C. B., N. S., 417.

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be less favourable to him than that of his own country. For example, the ship may visit a port where the law gives a maritime lien for repairs. So, in a converse case, the Merchant Shipping Act gives a right against an *American* mortgagee in respect of supplies procured, say at the *Cape of Good Hope*, and we do not consider that this provision is any violation of the comity of nations: *The Wataga* (a). It is a mistake to say that the Courts of *New Orleans* refused to recognise the law of *England*. They did recognise it, but they applied to it a universal rule of their own; which, as between a secret mortgagee and an attaching creditor, gives priority to the latter, just as our law gives the like advantage to the assignees of a bankrupt in reputed ownership of the goods of a foreigner. Such a rule, to be of any service, must be applied equally to foreigners and natives, for the mischief of a secret sale or mortgage is the same whether it be made abroad or at home. The principle of these judgments is well expounded in the case of *M'Neil v. Glass* (b).

[The VICE-CHANCELLOR.—There is a difference between allowing the title of a second purchaser to prevail in certain cases over that of a prior secret purchaser, and giving to a creditor the right to seize goods which do not belong to his debtor.]

The two cases are very analogous, as is shewn by the two statutes of *Elizabeth*, in which the principle is applied to purchasers and creditors on the same footing. Besides, the question is not whether the law of *Louisiana* is better or worse than the law of *England*, but whether a judgment applying it is to be treated as so absurd as to forfeit the weight which would otherwise belong to it.

If their law is not unreasonable in itself, and if they find a transfer sanctioned by a foreign law, which would

(a) 1 Swab. Ad. 165.

(b) 1 Mart., N. S., 261.

expose their subjects to the very evils which their own law was intended to guard against, they are not bound to regard the foreign rule which is thus repugnant to the policy of their own law. They may well say, "If we admit such mortgages, a foreign mortgagor may resell in *Louisiana*, and defraud the purchaser; and if we reject the secret mortgage in favour of a purchaser, why may we not do the same in favour of a creditor?"

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To turn to the authorities: *Cammell v. Sewell* is a case in point. The proceedings there were not in rem, so far as the ship was concerned. The sale was before the litigation, which related only to the application of the purchase money. But the right of the innocent purchaser was upheld; and it is to be noticed, that by innocent purchaser is not meant a purchaser without notice. The judgment disposes of a good deal that is erroneous in *Story* with respect to the law of domicile, and contains several illustrations which bear strongly on this case,—such as the conclusive effect against the true owner of a sale in market overt, and the seizure of the goods of a foreigner for rent due from another. *Castrique v. Imrie*, again, though the judgment there was in rem, was a still stronger case, because the *French* judgment which was upheld was founded on a blunder as to *English* law. The judgment of Baron *Bramwell*, in the Exchequer Chamber, is distinctly in our favour, and is not rested on the fact of the proceedings being in rem.

[The VICE-CHANCELLOR—Is there any special statute in *Louisiana* to the effect that creditors shall take priority over secret mortgagees?]

No; because their general rule rendered this unnecessary: *Story's Conflict* (a), *Olivier v. Townes* (b).

(a) Sects. 388, 389, 391.

(b) 14 Mart. 93.

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[The VICE-CHANCELLOR.—Suppose they had a law that a mortgage should not be valid unless attested by three witnesses, do you say they could reject an *English* mortgage because there was only one ?]

That would follow the analogy of the Statute of Frauds.

The rule is, that a judgment in rem is conclusive, not only as to the thing decided, but as to the facts appearing on the face of the judgment as the grounds of the decision ; and as between the parties—and the Plaintiffs here were, to all intents and purposes, parties to the litigation at *New Orleans*—the same principle applies to judgments in personam. I conclude, therefore, that there is nothing in the judgment so absurd as to justify this Court in setting it at naught.

Secondly, I ask, would this Court take away from a purchaser property which has passed to him, as this ship clearly has, by the law of the country where he bought it. Suppose a foreigner, interested in property here, and deprived of it by a blunder of our Courts as to foreign law, he would be bound nevertheless.

The authority cited on the other side, of *Dalgleish v. Hodgson*, is wholly inapplicable. That was an action by an underwriter ; and the question of neutrality, which had been decided in a foreign Court, was a mere collateral matter, which the judgment “inter alios” was brought forward to prove. No one could doubt, that in such a case the judgment being neither in rem nor inter partes, could be examined. *Reimers v. Druce* is equally beside the question. It is said, this is not a judgment in rem. Technically, that may be true ; but it is nevertheless equally conclusive, and for the same reason, that it alters the status of the subject matter. *Story* (a) speaks of

(a) Sects. 592, 593.

judgments not in rem, but analogous to judgments in rem, as in cases of garnishment and the like.

[The VICE-CHANCELLOR.—The precept to the sheriff was not to seize this ship, but any property of the debtors.]

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That is true; but the result was a complete divesting of title to the ship according to the law of the country, and this by the sentence of a competent Court in the presence of all parties interested.

All the authorities on the general subject are contained in the note to the *Duchess of Kingston's case* in *Smith's Leading Cases*, and are well summed up in *Bowen v. Evans* (a). That was a Bill to set aside a sale under the decree of the Court; and after noticing *Lloyd v. Jones*, *Bennett v. Hamill*, *Curtis v. Price*, *Lightburne v. Smith*, the conclusion arrived at was in effect this, that a decree in presence of all parties, no matter how erroneous it may be, is just as conclusive as a judgment in rem. The Defendant *Fogo* is an innocent purchaser, who cannot recover his purchase money if he loses the ship; and against such a person this Court gives no relief. It was suggested, we might recover against *Hughes & Co.*, but there was no warranty of title, and the law of *Louisiana* would give no such remedy. To enable us to do that, the judgment must be shown to be bad in *Louisiana*, which it certainly is not, whatever may be thought of it here. Even in *England*, there is no warranty of title on a sheriff's sale. It is to be observed, also, that among the creditors who shared the proceeds of the sale, several of the earlier held valid maritime liens; and in some cases their interventions were pointed directly against the ship, just as much as in *Castrique v. Imrie*. In part, therefore, the proceeding was for the satisfaction of maritime liens, and was in rem.

(a) 1 Jo. & Lat. 178, 258.

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[The VICE-CHANCELLOR.—There were claims for wages, but our Court of Admiralty could not sell the ship for wages.]

That can be done in *Louisiana*, and is consistent with the general law.

It is clear, moreover, that the Bank intervened voluntarily, and was in the same position as if Plaintiff in the cause, so far as the conclusive effect of the decision goes.

It is a mistake to say that the mortgage was disregarded by the sale. The claim of the mortgagees was not finally rejected until the hearing as to the distribution of the proceeds; and at the time of the sale the purchaser could not know that the proceeds would not have been handed over to the Bank. The only prior decisions were, first, that the right of a mortgagee was not a right to possession, but only to a charge; and, secondly, that the question of the charge should be transferred to the proceeds, and decided after the sale. According to the expert evidence, the purchaser took a perfect title under the law of *Louisiana*; and that Court was as much justified in disregarding a mortgage contrary to the policy of its own law, as this Court was in *Hope v. Hope* in disregarding the action of *French Courts* on a question of the custody of children, which the policy of our law gives to the father.

That there is nothing unreasonable in the rule adopted in *Louisiana* as to possession, even according to *English* notions, is sufficiently exemplified by *Twine's case* (a).

The rule, moreover, is a rule of administration, like those by which priorities are fixed, and in such matters the *lex fori* prevails according to the law of nations: *The Union* (b).

(a) 1 Smith L. Cas. 1.

(b) Lush. 128.

[They also cited *Story's Conflict of Laws* (a), and *Burge's Commentaries* (b).]

Sir *Hugh Cairns*, in reply :—

There are two fallacies in the arguments on behalf of the Defendants:—First, it is said that the law of *Louisiana* is not repugnant to reason, and therefore must be respected. We do not allege that it is unreasonable, but we say that it ought not to have been applied to a case governed, according to the universal principle, by the *lex loci contractus*, which was the law of *England*. If this principle is rejected, there is an end of all international law. Then the second fallacy was this :—It was said that the property passed by the sentence and the sale and that the case was analogous to *Cammell v. Sewell*. But this is not so. The sale was under a *fi. fa.*, and the Court guaranteed no title to the purchaser. *Fogo* was no party to the proceedings, and cannot plead them by way of estoppel. The sheriff only purported to sell *Klingenders'* interest. If a sheriff sells the goods of *A.* instead of the goods of *B.*, the purchaser takes no title ; and *A.* cannot recover against the sheriff because the sale passes no title, but must proceed in trover against the purchaser.

In *Cammell v. Sewell* there was this marked distinction, that an express statute gave the master power to sell for necessities. Here it is not pretended that the sheriff had power to sell anything more than *Klingenders'* interest. It is a fallacy, therefore, to say that the sale passed any property except subject to the mortgage.

Then it is said we are bound by our intervention. But it is clear our intervention was against the sale of the ship, not a mere claim to share the proceeds. The analogy insisted on of a sale under a decree does not touch us, for *Borcen v. Evans*, the authority relied on, went merely to

(a) Sects. 384, 385, 391, 550.

(b) Sect. 391.

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the point of irregularities in the sale, and not to a total want of jurisdiction to sell: *Townsend v. Warren* (a) illustrates this.

There can be no question as to what the decision of the Court of *Louisiana* went upon. On the face of the judgments, and from the evidence on the part of the Defendants, it is clear that the Court refused altogether to recognise any mortgage which was not accompanied by possession.

It is scarcely necessary to notice the suggestion that a submission to the *Louisianian* doctrine would only add one more to the dangers of a mortgagee. If true, this would be no argument; but in fact the risks pointed at—bottomry and respondentia—are elements not of danger but of safety, and take their priority solely on that account.

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 February 13th.
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VICE-CHANCELLOR SIR W. PAGE WOOD :—

In this case the Plaintiffs, who represent the Bank of *Liverpool*, had in the year 1854 acquired a title to the *British* ship *Warbler*, then at sea, by an assignment in the nature of a mortgage, duly registered, and unquestionably valid according to the law of this country. The mortgagors, by name Messrs. *Klingender*, continued to navigate the ship, which, according to the law of this country, they might do without any impeachment of the title of the mortgagees. In the course of that navigation, towards the close of 1857, the ship was sent on a voyage to *New Orleans*, in *Louisiana*, and arrived at that port in the month of December.

In January, 1858, the vessel was attached by a creditor of the mortgagors, at first by way of process to found jurisdiction

(a) 1 Jo. & Lat. 221, in not.

tion, and afterwards in a more formal manner, for the purpose of placing it in the hands of the law, with a view to that which ultimately took place—a sale by the sheriff. The mortgagees (the Plaintiffs) had in the meantime, and anterior to any decision with reference to the sale of the ship, sent out a power to their agent, Mr. *Mure*, the *British Consul at New Orleans*, to take possession of the ship on their behalf, which by the law of *England* he was entitled to do. Finding, however, the ship attached, Mr. *Mure* took the course which the law of *Louisiana* points out, and intervened in the action, presenting to the Court his title, and claiming possession of the ship. The result of this was, that several hearings took place with reference to this intervention.

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After presenting his petition, in which he claimed the ship, and before that was ripe for decision, *Mure* made an interlocutory application by way of motion, that on giving a bond to the value of the ship to abide the decision of the Court, he might be allowed to take immediate possession and carry the ship off, leaving the question ultimately to be determined on the bond. This motion was distinct from the petition of intervention by which he claimed the ship by virtue of his title as representing the mortgagees. The result of the whole case was this: That the Court of *Louisiana*, having heard *Mure*, declined to recognise any title whatever in him, and sold the ship, but sold it under process exactly analogous to our *fi. fa.*, that is to say, they sold all the right and interest of Messrs. *Klingender* in the ship. Apart from the intervention, there can be no doubt what the result of this state of things would be, nor is there any contest in this respect upon the pleadings. Of course, a sale of all the right and interest of the mortgagors, according to our law, would simply pass the equity of redemption subject to the mortgage; and if the ship itself was sold by any arrangement with the mortgagees, the creditors would be entitled only to the surplus which might remain after

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paying the mortgage debt. That point is not unimportant to be kept in mind. Both from the form of the proceedings and from the evidence of Mr. *Bradford*, it is clear that the sheriff was to sell only the right and interest of the debtor; and that if Mr. *Mure* had not intervened, his rights would have been unaffected by the sale. Whenever, therefore, the ship came back here, the Bank would have been recognised as the owners to the extent of their mortgage, as fully as if no sale had taken place. In fact, however, *Mure* did intervene, and the question is how far this has rendered the sale binding against the Bank. Since the argument, I have considered the authorities maturely, in order to extract the principles which govern the action of our Courts with reference to a foreign judgment of this character, supposing the conclusion to be arrived at, that it is erroneous on the face of it.

Whether this judgment does so err or not against the recognised principles of what has been commonly called the Comity of Nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider. But I will first discuss the general question, to what extent the Courts of this country recognise the judgments of foreign tribunals. The broad principle which has been established is, I take it, this, that a good title acquired in one country shall be a good title all over the globe; that general doctrine being qualified by special rules applicable to different classes of property. As to real estate, the legal title to property throughout the globe cannot be acquired except according to the laws of that country in which the real estate is situated. Every transfer of real property is governed by the *lex loci rei sitæ*. As regards the acquisition of title to property of a moveable nature, questions sometimes arise whether the *lex loci contractus* shall prevail, or the law of the domicile of the parties. In this case it is immaterial to consider that question, because the two

circumstances concur, both the place of the contract and the domicile of the parties having been *British*. Sometimes also the *lex loci rei sitæ* has been thought to be applicable even to moveables; but it is unnecessary here to consider whether, under any circumstances, that rule can prevail, because there can be no doubt that if any special locality is to be ascribed to the ship at the time of the contract, it must be regarded as situated in this country. Therefore, by every possible rule that can be conceived to apply, the Plaintiffs acquired a title to the ship, which, according to ordinary jurisprudence, and the comity of nations as recognised throughout the civilised world, would have given them a title in every part of the globe. However, the ship going to *Louisiana*, the question has arisen how far this title can be displaced by a peculiar doctrine established by the Courts of that State. I may fairly call it a peculiar doctrine, for it is disapproved of by one of the most eminent jurists of *America*, Mr. Justice *Story*: it is referred to by Chancellor *Kent* or his editor in a note to his Commentaries as being so disapproved of, without any particular comment of his own: and it is also referred to unfavourably by an eminent jurist of our own country, the late Mr. *Burge*. The rule amounts to this: the Courts of *Louisiana* decline to recognise any title to a ship or any other chattel which is not acquired in the mode pointed out by their own law. They say, that in adjudicating on the rights of creditors attaching property within their jurisdiction they will be governed solely by the title which appears to be acquired according to their own course of law, and will disregard all other. In this state of circumstances the difficulty becomes very great, in saying how far the general principle of law which I have referred to, namely, that every person properly and righteously acquiring a title to property in one country shall hold it all over the globe, can be held to apply. The present Defendant, the purchaser at the sale in *New Orleans*, has acquired a title certainly good according to the law of

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Louisiana as there administered; and it comes to be a contest between the prior title acquired in *England*, which in every country except *Louisiana* would be recognised, and the title acquired by the law of *Louisiana* in defeasance of that prior title, a contest in truth whether we are to recognise the higher paramount law which regulates the acquisition of property by way of contract, or the judgment of the Court of *Louisiana*, which has conferred title in the manner I am about to describe. And in the first place I should say, that in speaking of title having been conferred by the Court of *Louisiana*, I do not mean to imply that there was any proceeding in rem. There was nothing of that kind, though there was a judgment against the claim of the present Plaintiffs. It was scarcely argued for the Defendants, that there was a judgment in rem. What the Court did was simply to direct a sale of all the right and interest of the *Klingenders*; and by the intervention on behalf of the Plaintiffs, by their claiming the ship against the creditors, and protesting against this sale in due legal form, the case was brought, as I take it, to a judgment inter partes, or at least it is brought so closely within the doctrines applicable to a judgment inter partes, that I am bound to decide this case on the assumption that there has been a plain and clear decision as between the Plaintiffs and the selling creditor adverse to the present Plaintiffs. The Defendant, the purchaser, therefore, who claims through the act of the Court, under the right of the creditor who set the Court in motion, must be regarded as claiming under the decision of the Court between adverse parties, from one of whom he derives his title.

The case is so peculiar, that it is very difficult to bring it under any general head of the law on the subject of foreign judgments. The law of foreign judgments is now so well settled, especially since the case of *Ricardo v. Garcias*, in the House of Lords, that the general question presents no difficulty. It is now quite settled that a decision inter partes by a foreign

Court, is conclusive between the parties and those claiming under them, in any other country, subject only to the question how far you may examine the judgment for error appearing on the face of it. In the absence of error appearing on the face of the judgment itself, with which a Court in this country can deal, the judgment is conclusive upon the merits of the matter in controversy between the two parties to the litigation. The latest case I have found is *De Cosse Brissac v. Rathbone* (a), in which the Court said, the point was too clear for argument, and that a foreign judgment could now be pleaded in bar in a suit in this country, provided it was between the same parties and on the same subject matter. But when that is laid down, there still remains the question, how far the Courts can examine a foreign judgment with reference to anything that appears on the face of it; and there are several cases in which it has been held that the Court is at liberty to disregard a foreign judgment for error so apparent. Without enumerating them all, it is enough for the present purpose to say, that a foreign judgment may be disregarded if any thing manifestly contrary to natural justice, as it is called, is found on the face of the record, as in *Buchanan v. Rucker* (b), where it appeared that process had not been served, except by a notice on the church door, the party not being resident on the spot or within the jurisdiction. There it was held, that a judgment founded on such proceedings was not conclusive.

Again, it has been held in several cases, especially on the subject of prize, (a point not unimportant in the present litigation), that any peculiar legislation of foreign countries which has not been recognised by the world at large, any peculiar legislation of their own with regard to a special subject matter, may destroy the conclusive effect of a judgment if it appears on the face of the record as the ground of decision. For instance, it has been decided in an action on a policy effected during a war, on the footing of a declaration that the ship was neutral, that where, by the local legislation of some

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(a) 6 H. & N. 301.

(b) 9 East, 192.

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one country not recognised by the other countries of Europe, ships are held to forfeit their neutrality if they contravene particular regulations not acquiesced in by the world in general, the Courts of all other countries are entitled to disregard such special regulations, and to treat even a judgment in rem as inoperative on the question of neutrality.

Then there is a third class of cases of which *Novelli v. Rossi* (a) is an instance. If it appears on the face of the record (the judgment not being in rem but in a litigation inter partes) that the law of this country was intended to be administered, but has been mistaken: there also the Court feels itself entitled to disregard the judgment. The error, however, must appear on the face of the judgment itself; and, subject to exceptions of this kind, the Courts have held the judgments of foreign countries to be conclusive: a rule which has been considered to apply with additional force to judgments in colonies of our own, because they are subject to a special appeal to the Privy Council. I myself have always felt bound to adhere as strongly as possible to that doctrine; and I think it only right to mention one case in which it appears that I transgressed from adhering to it too rigidly. That was in *Hunter v. Stewart*, in which I thought the Plaintiff was estopped from further proceedings here, he having filed a Bill in respect of the same subject matter, and praying the same relief, but on a different ground, in one of the colonies of *Australia*. The Lord Chancellor was of opinion that the foundation of the claim being new, although relating to the same subject matter, and based on rights which the Plaintiff possessed and knew he possessed at the time he instituted the original proceedings, he might file a new Bill founded on that equity of which he did not avail himself in the former suit. I only find a report of it at present in the "Law Journal" (b), in which

(a) 2 B. & Ad. 757.

(b) 31 L. J., N. S., 346.

the Lord Chancellor observes, that one test of the Bill being for the same matter would be, whether an answer to the allegations in the first suit would be any answer to the allegations in the second, and, finding it would not, says : "It may be admitted that the case made by the first Bill was insufficient to bind the Company consistently with holding that the case made by the second Bill is sufficient to bind the Company ; and this is the result not of new evidence, but of the allegation and proof in the second suit of an entirely different series of acts and conduct on the part of the Company. It is a different equity. It is indeed true that the case made by the second Bill must be taken to have been known to the Plaintiff at the time of the institution of the first, and might have been then brought forward, and it may be said, therefore, that it ought not now to be entertained ; but I find no authority for this position in civil suits, and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former Bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity." Certainly, I had supposed (erroneously, no doubt) that the view which appears to be taken by Vice-Chancellor *Wigram* in a case of *Henderson v. Henderson* (a), prevailed in reference to such a point, namely, that a person being in full possession of all his rights, is not entitled to keep back some portion of them, to file a Bill in respect of one portion of his case, and after failing in that to file another Bill with the same object in respect of the other portion, upon new and different grounds. What Vice-Chancellor *Wigram* says is this :—"The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might

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(a) 3 Hare, 115.

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have brought forward at the time." Then he refers to Bills of review, and the principle followed in that respect. That was the ground on which I thought it right to proceed. It was the same ground which was taken in the very same case of *Henderson v. Henderson* in the Queen's Bench by Lord Chief Justice *Denman* (a); and the opinion of the Lord Chief Justice is referred to with approbation in the case of *The Bank of Australasia v. Nias* (b), where Lord *Campbell* says:—"In the absence of direct authority, it gives us great satisfaction to think that Lord *Denman* seems to have taken the same view of the subject in *Ferguson v. Makon*, and still more distinctly in *Henderson v. Henderson*, where he intimates a clear opinion that a plea to an action on the judgment of a colonial Court ought to steer clear of an inquiry into the merits of the case, for whatever constituted a defence in that Court ought to have been pleaded there." That, no doubt, is limited to defences; and the Lord Chancellor's judgment has determined that a Plaintiff may subsequently upon different equities file two or three Bills for the same subject matter. I have thought it right to make these observations, in order that I may not appear to overstate the case as to the effect of a foreign judgment, in saying generally that a foreign judgment, except for such errors on the face of it as I have described, must be held to be conclusive.

But then occurs the peculiar case I have before me, which is that of a foreign judgment in which the Court has not mistaken our law at all, but, after distinctly stating it on the face of the judgment, has said that it disregards it for reasons which no doubt are entitled to great weight, so much so indeed as to have caused me some anxiety as to the decision of this case. For these reasons, the Court has said that in the case of a conflict between the policy of their law and that of a foreign country, they

(a) 6 Q.B. 288.

(b) 16 Q.B. 737.

will, where the interests of their citizens require it, disregard the title acquired by foreign law in favour of their own citizens, who, according to their law, would be entitled to relief. I ought perhaps first to notice a preliminary question, whether I have a right to look at the reasons assigned by the judges as part of the judgment. I apprehend clearly that I have. The question was gone into by the Master of the Rolls in the case of *Reimers v. Druce*, and having before me a transcript of the record which contains those reasons, like the jugemens motivés of the French Courts, I must regard the reasons as forming a portion of the judgment itself.

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Now I approach the facts, which do not require to be stated much more at length than in the summary with which I commenced my judgment. The ship was attached for a large debt, being at that time undoubtedly in possession of the mortgagors and not of the mortgagees. Very soon after that, but still after it, the mortgagees attempted to obtain possession through the medium of *Mure*; and it is quite clear, according to the *American* law, that *Mure* might have abstained altogether, and that, if he had abstained, this difficulty would not have arisen, and the title of the Plaintiffs in this Court would have been perfectly clear. But he did intervene by two processes. The first of these (though the last decided) was an intervention by a petition setting forth the title to the ship, and praying that the Plaintiffs in the action might be decreed to answer the petition, and that it might be declared that the petitioner was entitled, as creditor, to have the ship delivered up to him to hold and dispose of the same for the purposes of the mortgage. This was the formal intervention in the suit, and was followed a few days later by an interlocutory proceeding or motion, by which *Mure* claimed to have the ship delivered to him upon bond, without waiting for the final adjudication. This motion came on to be heard on

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the 18th January, and a rule to shew cause was granted, which was argued and dismissed with costs on the 5th February. The judges, in the reasons filed with this judgment, say, that there is no law authorising an intervenor who claims the property attached to give such bond, and distinguish the case from one where goods were consigned to a person who had made advances on them, and was in possession of a bill of lading, and as such entitled to possession. Then they proceed thus:—"But the instrument by which the Plaintiff in this rule has offered to prove title to the property seized, and the possession thereof, is nothing more than a mortgage. The mortgagee is not entitled to the possession of the property mortgaged; his right is to be paid by preference out of the proceeds of the sale of the mortgage property." For these reasons they dismiss the rule with costs.

I will pause for a moment on that judgment, which seems to me to disclose the root of the fallacy which runs through the whole course of proceeding of the Courts of *Louisiana*. I find the same reasoning on several other occasions when the case was brought before the Court. The Courts of *Louisiana* treat this mortgage title, which according to *English* law is recognised as an absolute right in the mortgagee entitling him to sell and not authorising any one else to sell without his consent, as amounting to nothing more than a right to be paid out of the proceeds of a sale, without saying by whom the sale is to be conducted. They assume, in fact, that the Court has a right, as against the mortgagee (which according to *English* law the Court would not have), to sell the chattel itself, leaving him to be paid, if he has a title to be paid, out of the proceeds of the sale. The distinction is very important; for this reason, that all the authorities admit, that, with reference to the priority of creditors, in the administration of assets, the *lex fori* prevails. When you have chattels to be sold, and assets of a testator to be distributed here in *England*,

they will be applied first in paying Crown debts, then judgment debts, specialty debts, and simple contract debts in order, and the property would in any case be administered and the priorities settled according to the *lex fori*; but here what strikes me is this, that it was not a question of administering assets at all, but a question of property. The mortgagee, according to our law, is entitled to hold the ship against all the world; and if he says "It is not convenient to me to sell—I shall exercise my rights as I think best," he cannot be compelled to have the property sold, and come in and make title to such portion of the assets as he can claim. That consideration displaces the whole line of argument adopted by the *Louisiana* Court. The view taken by the Court in the first instance, upon the claim to give bond for the ship, was founded partly on technical grounds, and partly on the reason which I have mentioned. This was followed by several other proceedings, not very material to be noticed until we come to the Hearing of the 26th of January, 1859, when the original petition of intervention claiming the property in the ship was adjudicated upon by the Lower Court. The judge on this occasion reiterates the fallacy already noticed. He says, "I regard the document relied on by the opponent as a mortgage for the security of a debt, and not as a bill of sale of the ship. The instrument being regarded in this light, it follows that the opponent is a mortgage creditor, and not an owner." There, again, the Court totally refuses to recognise our law by which the Bank were owners, though owners by way of mortgage; but clearly owners in the sense of being entitled to say, "No one but ourselves shall sell the ship; we are not bound to leave the ship to be sold by others, and then to claim a share of the proceeds." Those were the decisions of the Fourth District Court, and in both cases appeals were lodged.

The appeal first heard was from the order dismissing

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the motion to bond the ship, as it is termed. The Supreme Court of *Louisiana* gave judgment on that appeal on the 31st of January, 1859, and, as in the former instances, the reasons of the judges are stated on the record. They say, "Mr. *W. Mure* has applied for possession of the ship on giving a bond, and bases his application upon the allegation, that during the litigation great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in *Liverpool, England*, for the security of the Bank, by which the ship was conveyed to *Langton* as trustee for the Bank, with authority to sell and pay the debt." Then they notice that the bill of sale does not purport to convey the ship to the Bank, but to a trustee, and add this observation:—"The Bank is, therefore, not the owner. At common law, the instrument, we suppose, would be considered, as between the parties at least, to convey the legal title in the ship to *Langton*. The only rights the Bank of *Liverpool* could have would be a right in Chancery to enforce execution of the trust. Hence the most favourable footing on which the claim of the intervenor can be placed, is that of a creditor with a privilege; he has, therefore, no right to the possession of the property, and must enforce whatever rights he may have upon the proceeds, precisely as the attaching creditors are compelled to do." Then they assume that their law confers the right to set aside an attachment by giving bond only upon owners and not upon creditors.

Now there again the Supreme Court seems to hold what appears to me to be the fundamental fallacy which pervades the whole course of procedure. They do not look to the *English* law to ascertain what the rights are under a conveyance in trust to sell or by way of mortgage, but they treat the mortgagee as having only a privilege giving him

a certain degree of priority, whatever it may be, which is to be adjudged and settled according to *Louisiana* law. If they were right in denying the ownership, the question would resolve itself into one of priority, merely a question of the distribution of assets, in which case the Court which has the jurisdiction over the assets, has the right to say that they shall be distributed according to the law of the country where the distribution is asked for. But the Bank were claiming as owners, and utterly disputing the right of the Court to deal with the assets in any way.

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Now I come to the decision of the main case, on the appeal from the order dismissing the petition of intervention. The case was decided by the Supreme Court on the 13th January, 1860, and seems to have been heard by a full Court, and evidently from the terms of the judgment was argued at length, and received a most attentive and able consideration. I have given to this judgment the most anxious consideration. The judges state the case thus:—"The Bank of *Liverpool*, as vendee and trustee, claims the legal title of the ship. The petition of intervention was dismissed on the trial in the Lower Court, and the intervenor appeals. The case merits perhaps a synopsis of the instrument upon which the intervention is founded." Then they say, that by this instrument *Klingender Brothers* nominally sell to *Langton*, chief manager of the Bank, the ship *Warbler*, in trust that the same may be a continual security to the Bank for the money due or to become due; that *Langton*, the trustee, is authorised to sell the ship, and to apply the proceeds, first, to costs; secondly, to the debt due to the Bank; and the remainder to *Klingender Brothers*; and that another clause obliges the trustee, on satisfaction of the trust, to re-convey. After this description of the deed, they proceed thus:—

"The instrument is no doubt executed in conformity to the Act of Parliament and the *English* law. Under

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that law the intervenor would have been able in the *English* Courts to protect himself against subsequent purchasers, creditors, and the effects of bankruptcy. If it be admitted that the intervenor has such rights upon the ship by the *English* law, the question naturally arises, Why are not these rights entitled to be respected in *Louisiana*, particularly as all parties to this controversy have their domicile in *England*? It is not surprising that the question is repeated, and that the Courts are again and again called upon to answer it. The comity of nations extends only to enforce obligations, contracts, and rights, under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises. The instrument offered in evidence has no analogy to any mode known to our law, of affecting personal property for the security of debts. It purports to sell to one man to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale nor a pledge, for there is no delivery which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws."

That sentence contains the whole principle of the judgment. There are some other reasons added, but the essence of the judgment really is this: "The law of *Louisiana* does not allow a mortgage, or any other dealing without delivery, to convey a right of property as between citizens of *Louisiana*, and therefore we will not allow any such right as against our own citizens at the instance of foreigners, although the law of the foreign country where the contract was made does give full effect to the transfer of ownership." After laying down this doctrine, the judges discuss the authorities in their own Courts, and remark that "the hardship of

their rule is not so great when it is considered that in case of ships it usually happens that the parties holding liens and mortgages in the home port have had the opportunity of enforcing the same, and have voluntarily permitted the ship to depart without so doing." They also notice an argument that the instrument was assimilated more to a *vente à réméré* of their law than a mortgage, and hold that it could not be so regarded, and could be viewed in no other light than as a security for money. In conclusion they hold that the intervenor has no right in the ship, and declare their judgment final.

Subsequently, on the distribution of the proceeds, the Courts gave no portion of the assets to the mortgagees.

That being the course of the litigation, I have to look to the evidence of what the law of *Louisiana* is. The judgment supplies it to a great extent, and we have also in the Answer set forth certain portions of the law of *Louisiana*—Acts of their Legislature—which are only important on a minor part of the case, relating to priorities given to certain creditors for wharfage and anchorage, sailors' wages, &c. Besides this, we have the evidence of Mr. *Bradford*, which I do not think really carries the law further than the judgment of the Court itself would do. His evidence goes first to the point I have already considered, as to the effect of the intervention according to the law of the State of *Louisiana*, and the rest amounts to this, that, according to the law of that State relating to shipping, the persons who have possession of a ship as owners, are for all purposes deemed to be the true owners. That really does not go a step beyond the law laid down on the face of the judgment. The whole question is, whether the mortgagors were in possession as owners. According to *English* law, the mortgagors have not possession of the ship as owners, they have only possession subject to the mortgage; and I do not apprehend the witness means to include persons who are merely apparent

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owners, because that would extend to possession by factors, a subject with which he is evidently not dealing. The law of *Louisiana*, therefore, as laid down in this case, says, that a mortgagee who has a perfectly good title, a complete owner according to the law of the country to which the contract belongs, ceases to be the owner the moment the vessel arrives at *Louisiana*, as against any creditor of his mortgagor who may attach the ship.

The case was most ably argued for the Defendants, and I was pressed very strongly with the contention that when a person is allowed to be in the management and control of property, which he holds not as absolute owner, but subject to a mortgage, there is nothing contrary to natural justice in saying, that, as regards creditors and third parties, he shall be deemed owner to all intents and purposes. Reference was made to cases of reputed ownership, distresses by landlords, and a variety of other illustrations; but I apprehend that the whole of this argument is beside the controversy here. If the State of *Louisiana* had been minded to pass a special Act, and to give all the world notice (as we have done in respect to reputed ownership by passing our Bankruptcy Act), that, as regards property coming within their jurisdiction, the apparent owner should (in the interest of their citizens) be treated as owner to all intents and purposes, so far at any rate as to pass the property to creditors, a very different case would be presented from that which I have to consider. This distinction is what appears to be pointed at by Mr. Justice *Story*, when he comments on the decisions of the Courts of *Louisiana* with great dissatisfaction. He says, it might be very well for the legislature to lay down some such rule, but he thinks it contrary to sound jurisprudence for a Court (in the absence of positive enactment) to say, that whoever brings a chattel within their jurisdiction as apparent owner, shall be deemed to be the true owner—a sweeping doctrine which would embrace the case of factors and

others of that description. He adds, that a judge so deciding displaces the title of the owner of the ship altogether by saying "that is an ownership I will not regard." That is exactly the course which the judges have taken here. On the face of their judgment they treat the mortgagee as absolute owner according to the law of *England*; and then they say that coming into their State he is not to be treated as owner by their Courts.

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Although this is the prevailing doctrine in *Louisiana*, the judges do seem to have had some misgivings about it. I shall presently notice one remarkable exception to the general current of their decisions, *Thuret v. Jenkins* (a), where the judgment seems originally to have proceeded on a class of authorities more in consonance with the general administration of the law as between the subjects of foreign countries. The history of the doctrine which has been applied in this case may be traced in the reported decisions of the Courts of *Louisiana*. The first class of cases they had to deal with was that of ships actually in their own ports belonging to foreigners, and properly sold according to the foreign law while lying in the ports of *Louisiana*. That seems to have been the first class of cases in which the rule of disregarding ownership without possession was established, and it was afterwards extended to other cases similar to the one I have before me. I have had the Reports before me, and it was with reference to them that I remarked that some question had been raised, whether the *lex loci rei sitæ* might not in certain cases be held to apply even to moveables. Certainly, it has been so held in *Louisiana*, in cases where, at the time of the transfer, the chattel has been within the actual dominion of their own State. I am not aware that any other Courts have gone so far as this; but in the present case, the chattel was not brought within their dominion until the contract title had been acquired. There can be no question that the ship belonged to the Plaintiffs, to all intents and purposes, until she entered the waters of *Louisiana*; and to

(a) 7 Mart. 318; Story's Conflict, sect. 391.

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apply the local law to such a case, would be an immense extension of the principle laid down in the first instance in *Louisiana*.

The principle itself is considered at length in *Story's Conflict of Laws* (a); he introduces the subject by the observation, that the question has been much discussed in the Courts of *Louisiana*, from a supposed difference between the rule of the common law and that of the civil law. By the common law, a sale of goods is or may be complete without delivery; but by the law of *Louisiana*, delivery is necessary to complete the transfer according to the well-known rule of the civil law, "*Traditionibus et usucapionibus dominia rerum nonnudis pactis transferuntur*," and says, that on the fullest examination, and after repeated arguments, the Supreme Court of *Louisiana* have held the doctrine, that the transfer of personal property in that State is not complete, so as to pass the title against creditors, unless a delivery is made in conformity to the laws of that State, although the transfer is made by the owner in his foreign domicile, and would be good without delivery by the laws of that domicile. Then he says, that the reasoning by which this doctrine is maintained, is most fully developed in a case in which a transfer of a part of a ship was made in *Virginia*, the ship at the time of the sale being locally at *New Orleans*. This was *Olivier v. Townes* (b). The reasons given in that case, by the very able judges, are explained at length, and will be found to turn principally upon the view (for which they cite *Huberus*), that in applying the common law of the comity of nations, this reservation must be understood "*Si nullum inde civibus alienis creetur prejudicium in jure sibi quæsito*," they say it would prejudice their citizens if the general rule of law were adopted; and they put it thus: "This city is becoming a vast storehouse for merchandise sent from abroad owned by non-residents, and deposited here for sale; and our most important commercial transactions

(a) Sects. 386 et seq.

(b) 14 Mart. 93, 102.

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are in relation to property so situated. If the purchasers of it should be affected by all the previous contracts made at the owner's domicile, although unaccompanied by delivery, it is easy to see to what impositions such a doctrine would lead, to what inconvenience it would expose us, and how severely it would check and embarrass our dealings. However anxious we may be to extend courtesy and afford protection to the people of other countries who come themselves or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of." It must be borne in mind, that, in applying this reasoning to a chattel actually within the jurisdiction, and dealt with out of the jurisdiction, you have a case not nearly so strong in favour of the foreign owner as that before me, where the chattel did not enter the jurisdiction until long after the title had been acquired. Mr. Justice *Story*, in commenting upon that case, admits the force of the reasoning upon general principles, and says that it is competent for any State to adopt such a rule in its own legislation; and that, being made for the benefit of innocent purchasers or creditors, it could not be deemed justly open to the reproach of being founded on a narrow or selfish policy. "But," he adds, "how far any Court of justice ought, upon its own general authority, to interpose such a limitation, independently of positive legislation, has been thought to admit of more serious question, since the doctrine which it involves aims a direct blow at the soundness of the policy on which the general rule that personal property has no locality is itself founded," and goes on to say that it is not easy to reconcile such a rule with Lord *Loughborough's* doctrine in *Sill v. Worswick* (a). It may indeed be said, that as we may make in our country a law about the apparent ownership of the property of bankrupts, they may make a more general statute law in *Louisiana*, that they will not

(a) 1 H. Bl. 665.

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recognise ownerships of this description; but in the absence of such a law, a judge being required to say whether A or B is the owner of a chattel would, I apprehend, in every country except *Louisiana*, give the same answer. Then I should add, that Mr. *Burge* takes exactly the same view in his Commentaries (a), in which he mentions these decisions of *Louisiana*. He says:—that the decisions in which this doctrine has been established, proceeded on the ground that to have given effect to the *lex loci contractus* would have prejudiced the rights of the creditors in *New Orleans*, and on the assumption that such cases came within the alleged exception I have before referred to. Mr. *Livermore* (b), also a celebrated *American* writer, has with great force combated the doctrine deduced from these decisions; and Mr. Justice *Story* strongly points out its necessary tendency to invalidate the rule that moveables have no locality. In the Commentaries of Chancellor *Kent* (c) is a note—I am not quite clear whether by the learned author or his editor, but a note which states the rule of the Courts of *Louisiana*, and the comments of *Story* and *Livermore*, without expressing the writer's own opinion. The views therefore of the leading *American* authorities are by no means favourable to the peculiar doctrine of the Courts of *Louisiana*.

Mr. Justice *Story*, it will be observed, refers to the case of *Sill v. Worswick*, before Lord *Loughborough*, a judgment extremely able, though we must remember that at that time the doctrine as to foreign judgments was not so firmly settled as it is now. This perhaps explains an expression in that judgment which made me pause very much before coming to a conclusion in the case now before me. After laying down the law very clearly with regard to the domicile of the contracting parties, as that which must govern the right to personal effects—the case being one as to the effect of bankruptcy in this country in vesting the whole of the trader's property in his assignees, and enabling them to

(a) Vol. 3, p. 764. (b) Dissert. p. 137. (c) Vol. 2, p. 538.

assert a claim to property which had been recovered abroad by a creditor from the bankrupt—Lord *Loughborough* held that the title of the assignee ought to be recognised all over the world, and in the course of his judgment made these observations (a):—"I do not wish to have it understood that it follows as a consequence from the opinion I am now giving: I rather think that the contrary would be the consequence of the reasoning I am now using, that a creditor in the foreign country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided." Now, I confess that struck me as having a very important bearing on this case, for Lord *Loughborough* seems to intimate that however plain the requirements of the comity of nations may be, he does not think he should hold that he could come to any conclusion which would authorise him to say that the right acquired under a foreign judgment was to be interfered with. However, I have the satisfaction of seeing that this point has not been altogether without consideration in a case which has been very much discussed before me, *Castrique v. Imrie*, though the actual decision has no immediate bearing on the present question, because clearly there the transaction was a judgment in rem. But there is an intimation of opinion in the Lord Chief Justice's judgment as to what the law would be under the very circumstances which have happened in the present case. The Lord Chief Justice says (b):—

(a) P. 693.

(b) 8 C. B., N. S., 415.

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"It is not disputed that a judgment in rem obtained without fraud and pronounced by a competent Court, is generally binding upon all the world ; but it is contended, that in this case an exception should be made to the rule, on the ground that it being clear that the incidents of the contract entered into by the master on behalf of his owner were to be governed by the *lex loci* of the contract (in this instance the law of *England*), the *French Court* knowingly and intentionally set that law at nought, thereby violating the comity of nations, by virtue of which alone the judgment of the tribunals of one country are respected by those of another. It is unnecessary to pronounce any decision upon the principle of law involved in this argument." [It was unnecessary, for this reason that they held that the Court, though it might have mistaken the law, had not wilfully disregarded it, and that a mere mistake would not invalidate a judgment in rem.] "It is right to say that if it were, some members of the Court are strongly disposed to think that even if the facts on which the argument turns were made out, it would not afford a reason for questioning the validity of a judgment in rem. Others on the other hand—if it could be shewn that, in a case in which the effect of the contract was to be determined by the *lex loci contractus*, a foreign Court perversely insisted on applying its own law, being in conflict with the former, thereby outraging the principle of international comity in a manner amounting in fact to a species of judicial misconduct—are by no means prepared to say that in such a case it would not be the duty of a Court in this country to refuse to recognise the binding efficacy of such a judgment, not by way of reprisal towards the foreign tribunal, but to protect our own fellow-subjects from injustice."

Those observations are made with reference to a judgment in rem, always a much stronger case than that of a judgment inter partes, because the true principle of a judg-

ment in rem, I apprehend, is that large general principle which I said at the outset embraces all these cases, viz., that a person who acquires a valid title by the law of any country shall be deemed all over the world to be the owner of the subject matter. If, therefore, the Court has absolutely the disposal of the res, and it is in its power, as it is in the case of a judgment in rem in the Admiralty Court, it does not matter who is owner; all Courts assume that the matter has been fairly litigated, that the persons brought before the Court had such an interest as entitled them to raise the contest, and then that judgment in rem binds all the world, and cannot be disputed even by strangers to the litigation. A judgment inter partes would not stand in so strong a position; but even on a judgment in rem, it seems that while some of the learned Judges thought that the fact of its being in rem would prevent their looking even at perversity on the face of the decision, other Judges were of opinion that if the foreign Court did utterly disregard our proceedings, we could not allow the title of our citizens to be defeated by a decision which could only be arrived at by a total disregard of the comity of nations, according to which the title of our own citizens would be respected. I should say with respect to an argument founded on my judgment on the demurrer in this case, that my meaning has been a little misunderstood, and that I never intended to countenance any vindictive principle with regard to the conduct of another country whose Courts have refused to recognise the proceedings of our own. It is obvious that all I could mean was, that our own citizens must be so far protected that they shall not be in a worse situation in *Louisiana* than they are in *China* or any other part of the civilised world. If you do find a course of proceeding there which is not recognised by any other country of the civilised world, our own citizens must be protected from the loss of their property, which would be inflicted by decisions so arrived at.

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The decision in *Cammell v. Sewell*, like that in *Castrique v. Imrie*, appears to me to have no bearing on the present question. The Exchequer Chamber held that the master had, by the law of *Norway*, a power of conveying a good title to the property in question, and therefore, that the person who acquired the property in *Norway* from one competent to give a good title in *Norway* obtained a good title as against all the world. This is wholly different from the present case. Here it is admitted that the sale was under a writ analogous to a *fieri facias*. In *Castrique v. Imrie*, as Mr. Justice Byles points out, it was not a proceeding similar to a *fieri facias*, but a proceeding in rem. Here the foreign Court had no power to deal with anything that was not the property of Messrs. *Klingender* the debtors, and only arrived at the conclusion that they would hand over the ship to one of their own subjects, by saying that they would disregard the right of property acquired by the Bank, and treat the ship as *Klingender's* property, because the transfer of ownership was effected in a manner which their Courts do not recognise.

Before concluding, I must notice one other case to which I have already incidentally referred, as showing that the Courts of *Louisiana* do not appear to be perfectly clear, that they are right in insisting on their rule in cases where the chattel is not in their jurisdiction at the time when the foreign transfer is made: I mean *Thuret v. Jenkins* (a). There, as here, the transfer had been made while the ship was at sea. There had been no delivery, but the mortgagor retained possession and brought the ship to *Louisiana*. There she was attached, and the judgment was in favour of the mortgagee. The Court cited Mr. Justice Story for the proposition that by the common law of *England* a grant or assignment of goods and chattels is valid between the parties without actual delivery, and that the property passes immediately upon the execution of the deed, though as to creditors the title is not considered per-

(a) 7 Mart. 318, 354.

fect unless possession accompanies the deed. "This," they say, "is the principle which has regulated this Court in the decisions cited at the bar. But the learned Judge continues, 'an exception to the rule is, where the possession of the grantor is consistent with the deed, or where the property conveyed is at the time of the conveyance abroad and incapable of delivery. In the latter case the title is complete provided the grantee takes possession in a reasonable time after the property comes within his reach.' The laws of *Louisiana* do not, it is true, recognise the last exception. Property does not pass here by contracts, but by delivery *traditionibus non pactis*. If the ship had been within the State at the time of the sale, the rule in *Norris v. Mumford* would have regulated the decision of this Court, but as at that time she was not within the State, the sale ought not to be tested by our laws. It must be by those *loci contractus* against which those of no other country ought to prevail." In another passage of the judgment the same view is still more strongly put: "In the present case the ship, the subject of the sale, was at sea, was a *New York* ship, and the vendors and vendee resident in *New York*. If therefore according to the *lex loci contractus*, that of the domicile of both parties, the sale transferred the property without a delivery, it did so *eo instanti* or not at all. In transferring it, it did not work any injury to the rights of the people of another country, it did not transfer the property of a thing within the jurisdiction of another Government." "If two persons in any country choose to bargain as to the property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country in which the chattel is will there be permitted to be affected by their contract. But if the chattel be at sea, or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world, and the circumstance of the chattel being afterwards brought into a country, according to

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the laws of which the sale would be invalid, would not affect it." Every word of that applies to the case I have before me, though it is only right to add that the judgment proceeds afterwards on the ground of the impossibility of taking possession. Although I cannot say I consider it very consistent with the former decision, the Court appears to have proceeded on this distinction; the impossibility of taking possession furnished the excuse for not complying with the *Louisiana* rule with reference to the transfer of chattels, and it was held that the attaching creditor ought to be displaced because the transferee might perhaps have taken possession if he had had the opportunity. This reasoning does not seem very satisfactory, because I cannot see how the creditor is injured more in one case than in the other. The circumstances as to the creditor seem to be the same, the only question being who has or has not the property in the ship.

In conclusion, let me consider what the consequence would be if this special rule of the Courts of *Louisiana* were allowed to prevail against the rest of the world. Suppose the law of *Louisiana* required two witnesses to the transfer of a ship, it might be said, "It has been transferred in *England* it is true, but the transfer is invalid for want of two witnesses." Perhaps you might go to another country and find that something else was necessary to be done. Possibly possession might be held insufficient without some further ceremony, and thus the chattel might belong successively to *A, B, C, D, or E*, according to the law which prevailed in the particular country to which the ship was sent.

I confess it seems to me that much of this error (for error I must, with all respect for the Court of *Louisiana*, assume it to be) has proceeded from the Court confounding two things: the question of distribution of assets and the question of the title to property, for I find that in justifying their decision in a similar case, that of *Oliver v. Townes*, the judgment in which is given fully in sec-

tion 388 of Mr. Justice *Story's* work, they say, "What the law protects it has a right to regulate. A strong evidence of this is furnished by the doctrine in regard to successions. The general principle is that the personal property must be distributed according to the law of the State where the testator dies, but so far as it concerns creditors it is governed by the law of the country where the property is situated. If an *Englishman* or a *Frenchman* dies abroad and leaves effects here, we regulate the order in which his debts are paid by our jurisprudence, not by that of his domicile."

1863.
SIMPSON
v.
FOGO.
Judgment.

Under these circumstances, having to come to a decision in a case which is entirely new in specie, and which will never arise, as it seems to me, in any other country in the world except *Louisiana*, I confess I yield to the view of that section of the Judges who considered, in the case of *Castrique v. Imrie*, that even a judgment in rem may lose its binding force where there appears on the face of it a perverse and deliberate refusal to recognise the law of the country by which title has been validly conferred. The law of *England* being by the comity of nations that which must govern the transfer—the transfer being in *England*, the parties resident here—the ship an *English* ship at sea on a voyage from an *English* port; when I find a foreign Court saying "we will deal with that ship as the property of the person who has already transferred it," that seems to me to be so contrary to law, and to what is required by the comity of nations, that I am bound to hold that the property acquired by the Bank of *Liverpool* must prevail against a sale made on the principle entertained by a foreign Court, that, as between mortgagors and mortgagees, the mortgagees' interest is wholly to be extinguished, and the right of the mortgagors is paramount and absolute.

There are some minor points which remain to be dealt with. There are certain other creditors besides *Hughes &*

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 SIMPSON
 v.
 FOGO.
 Judgment.

Co., who had by the law of *Louisiana* a privilege, as it is called, against the ship, and among them *Mr. Mure* himself, acting as *British Consul* and not as agent for the Bank, was subrogated in respect of wages which he paid to the crew. These creditors had a prior claim according to the law of *Louisiana*, and it is to be observed, that, had those persons sold the ship, it would have been a matter in rem, and the property would have passed. But clearly that was not so. The sale being at the instance of an ordinary creditor, the privileged creditors come in and claim to be first paid out of the proceeds. It appears to be proved that these creditors had privilege by the law of *Louisiana*, and might have arrested the ship. They were paid, and therefore, they having been paid by the Defendants who purchased the vessel, the amount so paid must be allowed.

There will, therefore, be a declaration that the mortgagees, under the indenture of the 25th of December, 1854, are entitled to the ship upon the trusts therein declared in favour of the Bank of *Liverpool*, and also to all freight receivable since the 15th of January, 1858, when *Mure* claimed possession, subject, both as to ship and freight, to a prior lien on the part of the Defendant *Fogo* in respect of the sums paid to the privileged creditors.

NEEDHAM v. OXLEY.

1863.
 May 30th.
 Practice—
 Patent—Particulars of Breaches.

Particulars of breaches delivered with a view to a jury trial of a patent case in this Court are sufficient, if, taken together with the pleadings, they give the Defendant full and fair notice of the case to be made against him.

THE Bill in this case was filed to restrain alleged infringements of a patent taken out by the Plaintiffs for machinery for expressing liquids or moisture from substances.

The Bill stated that, upon an inspection of a machine supplied by the Defendant to the *Westminster Brewery Company*, "the Plaintiffs ascertained, as the fact is, that the said Defendant's said machine was a palpable and obvious piracy of the Plaintiffs' said invention, and a colourable imitation of their said machine; and that, in fact, the only difference between the Defendant's machine and those of the Plaintiffs' were, that the Defendant had placed some wire gauze between the cloths and the slabs used in the Plaintiffs' said machine, and had bored some small holes in the said slabs. But the Plaintiffs charge that such differences were and are trifling and immaterial, and that they had themselves previously tried the use of the wire gauze, and found it useless; and that the said Defendant's said machine included and combined the following substantial ingredients combined in the Plaintiffs' said invention, and the combination whereof was new and important; that is to say, chambers in combination, ducts for drawing in the chambers, filtering medium, stand pipes, supplying each chamber branching from the stand pipes, and tie-rods binding the chambers together and forming one machine capable of being taken to pieces for the purpose of discharge."

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NEEDHAM
v.
OXLEY.
Statement.

A jury trial before this Court having been directed, the Plaintiffs, pursuant to the order of the Court, delivered particulars of breaches in these terms:—

"The following are the particulars of breaches, and the instances of machines constructed by the Defendant, which the Plaintiffs complain are infringements of their patent right.

"A machine or filter press for yeast, constructed by the Defendant, and supplied by him to Messrs. *Thorne's Westminster Brewery*, and in use there, and exhibited to the Plaintiffs in pursuance of the letter of Mr. *Messiter*, the Defendant's attorney, dated the 23rd day of February,

1863.
 NEEDHAM
 v.
 OXLEY.
 Statement.

1863, and being the machine in the said letter referred to.

"Also a certain other machine or press for clay, constructed by the Defendant, and supplied by him to Messrs. *Granger & Co.*, Pottery, of *Worcester*.

"Also a certain other machine or press for clay, constructed by the Defendant, and supplied by him to Messrs. *Cartwright & Edwards*, Pottery, of *Langton*, in *Staffordshire*.

"Also a certain other machine constructed by the Defendant, and exhibited by him at *Weyhill Fair*, in or about October, 1862.

"Also a certain other machine or press for yeast, constructed by the Defendant, and supplied by him to Messrs. *George & Co.*, Brewers, of *Bristol*.

"The Plaintiffs complain that each of the said machines above referred to was and is an infringement of the Plaintiffs' invention and patent right, and that the Defendant did in each of the above instances, by making, using, exercising, or vending the said machines, infringe the Plaintiffs' said right and invention, and that the Defendant in the said several instances above named did construct, make, exercise, and vend the same machine as is described in the specification of the letters patent granted to the Plaintiffs on the 14th day of July 1853, and thereby pirate and infringe the said patent.

The Defendant took out a summons for further and better particulars, which was adjourned into Court.

Argument.

Sir *H. Cairns*, Q. C., Mr. *Bagshawe*, and Mr. *Needham* (of the common law bar) for the Plaintiffs:—

It is not necessary to give further particulars, the Bill

having fully explained in what respects the Defendant's machines infringe our patent. Even at law it is not considered necessary to go into scientific details in the particulars, when sufficient information can be obtained from the previous proceedings: *Talbot v. Laroche* (a), *Electric Telegraph Company v. Nott* (b).

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NEEDHAM
v.
OXLBY.
—
Argument.

Mr. *Aston* (of the common law bar) for the Defendant :—

The particulars ought to let us know precisely in what respects the Plaintiffs mean to contend that our machines are an infringement of their patent. Here they only point to certain machines, and say, these are the breaches we complain of. The invariable rule at law is to require a more precise statement, though, as these matters come on at chambers they are not refused. The Plaintiffs' patent here is for a combination, and the cases cited on the other side were before *Lister v. Leather* (c), by which the law as to what is required to support a patent for a combination was settled.

Sir *H. Cairns*, in reply :—

The practice of requiring specific breaches to be stated in detail may be very well suited to common law modes of pleading ; but this Court will not allow the substance of the question to escape by forcing the Plaintiff to attempt hazardous scientific definitions which may end by rendering the trial abortive. All that is wanted is, that the Defendant should know what we complain of, and the particulars read with the Bill, and the specification which ties us down to the several combinations of parts, give him that information.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The particulars together with the Bill appear to me to give sufficient information. The object of having
(a) 15 C. B. 310. (b) 4 C. B. 462. (c) 27 L. J., Q. B., 295.

Judgment.
—

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NEEDHAM

v.

OXLEY.

Judgment.

these particulars delivered, is to give the Defendant fair notice of what the complaint against him is, not to tie the Plaintiffs down to the precise terms of any verbal definition, or to make the trial of the issue turn upon a point of form. Full and fair notice the Defendant is entitled to; but I should be very sorry to introduce anything like special pleading into the practice of this Court, or to allow verbal criticism to interfere with a determination of the merits of the contest. If it should turn out at the trial that the Defendant is prejudiced by any unfair suppression of the case to be made against him, I shall be able to deal with it. So far as I can judge at present, all the substantial information which the Defendant can require is given by the particulars and the pleadings in the cause. The summons must therefore be refused, with costs.

*June 25th.**Practice—**Cause and**Cross-cause—**Cross-examination.*

Where a suit is brought on by motion for decree, and issue is joined in a cross suit, and an order is obtained by the Plaintiff in the original suit for him to use in the cross suit affidavits filed in his own suit, it is at the option of the Plaintiff in the cross suit either to treat these affidavits as filed in the original suit, and so cross-examine the witnesses before an examiner, or to consider them as evidence to be used in his own suit, and give notice of cross-examination in open Court at the Hearing.

NEVE v. PENNELL.

HUNT v. NEVE.

THESE suits were cause and cross cause. Notice of motion for a decree had been given in *Neve v. Pennell*, and replication had been filed in *Hunt v. Neve*; and it had been arranged between the counsel on both sides, that, in order to save expense, the evidence should only be filed in one suit, and an order should be obtained for reading it in the other. At the time when this arrangement was made, *Hunt* had declared his intention of cross-examining *Neve* in open Court at the hearing of *Hunt v. Neve*.

In pursuance of this arrangement, various affidavits were filed in *Neve v. Pennell*, and, amongst others, an affidavit of the Plaintiff; and an order was obtained as of

course in *Hunt v. Neve*, dated June 2nd, 1863, in the following terms:—

"Upon the humble petition of the Defendant *William Tanner Neve*, this day preferred unto the Right Honourable the Master of the Rolls, for the reasons therein contained, it is ordered that the petitioner be at liberty at the Hearing of this cause, to read and make use of the following documents filed in a certain other cause in this court of *Neve v. Pennell*, that is to say, an affidavit of *William Tanner Neve*, an affidavit of *Maria Neve*," and certain other affidavits, and a paper of admissions therein specified.

A similar order was obtained by *Hunt*. The time for filing evidence in *Hunt v. Neve* expired on the 4th June, 1863; and on the next day *Hunt's* solicitors gave him notice that he would be required to produce himself at the Hearing for cross-examination on the affidavit above-mentioned. They also on a subsequent day obtained an appointment in *Neve v. Pennell* for cross-examination of *Maria Neve* on her above-mentioned affidavit before one of the examiners of the Court.

On the 17th of June, *Neve's* solicitors wrote a letter to *Hunt's* solicitors, suggesting that the proper course would be to have *Neve's* cross-examination conducted before the examiner; to which *Hunt's* solicitors replied on the 19th of June, by a letter which insisted on his cross-examination in open Court as a right.

Mr. A. E. Miller, for *Hunt*, now moved that *Neve* should be ordered to attend at the Hearing of *Hunt v. Neve*—for cross-examination on his affidavit. The 7th rule of the Order on Evidence provides(a) that no cross-examination shall take place in a cause in which issue is joined otherwise than

(a) G. O. 5th Feb. 1861.

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NEVE
v.
PENNELL.
HUNT
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NEVE.
Statement.

Argument.

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 NEVE.
 Argument.

in open Court, except in four special cases, none of which have any application to the present case.

The moment the order of 2nd June was obtained, the affidavit in question became evidence to be used at the Hearing of *Hunt v. Neve*, and therefore within the General Order referred to.

This was no surprise on *Neve*, who had express notice that this cross-examination was intended; and the order of 2nd June would have been opposed had it been supposed that any attempt to avoid this cross-examination would be made.

Mr. *Wickens*, for *Neve* :—

This is a pure point of practice. The affidavit in question is merely an affidavit in *Neve v. Pennell*, and therefore cross-examination upon it ought to take place in that suit, in which case it would necessarily take place before an examiner. Doubtless, an order has been obtained giving leave to use in *Hunt v. Neve* evidence filed in *Neve v. Pennell*; but still that evidence is merely evidence in the last-named suit, and is subject to all the incidents of such evidence. *Hunt* has himself taken this view of the affidavit of Mrs. *Neve*, which is exactly in the same position as that of *Neve*.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

I think, if the order of 2nd June had been to the effect that all the evidence in *Neve v. Pennell* was to be used as evidence in *Hunt v. Neve*, there might have been some ground for Mr. *Wickens's* contention; because in that case all the evidence, both direct and in cross-examination, would at once have become available in both suits, and there would, strictly speaking, be no evidence whatever in the cross suit. But here I have merely an order that certain specified affidavits and admissions may be used in the

cross suit, an order made to save the expense of filing them twice; and under these circumstances I do not think that any cross-examination which might be had in *Neve v. Pennell* before an examiner could be used, in the face of this General Order, in *Hunt v. Neve*. That being so, I think *Hunt* is in the same position as if these affidavits had each been filed in both causes, and that Mr. *Miller* has a right to say—"I will exercise my own discretion in which cause I will cross-examine any particular witness;" and that he is entitled to cross-examine one witness before the examiner, treating his affidavit as filed in the original cause, and another in open Court, treating *his* affidavit as filed in the cross cause, if he see reason for taking that course.

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NEVE
v.
PENNELL.
HUNT
v.
NEVE.
Judgment.

Order *Neve* to be produced for cross-examination at the Hearing; and, *Hunt* agreeing to waive formal notice, make a similar order as to him. And, by consent, direct all cross-examinations taken in either cause to be used in both.

DAVIS v. DAVIS.

R. F. DAVIS by his will directed his executors thereafter named to distribute between and amongst his wife and sons respectively such portions as they should judge expedient of his plate, pictures, books, and household linen, and to sell and convert into money all the remaining portions if any, and all his household furniture and effects; and after various bequests not affecting the proceeds of such sale, gave the residue of his estate and effects to his sons *G. W. Davis*, *M. H. Davis*, and *J. W. Davis* (the Plaintiff) in equal shares and proportions. The testator appointed

July 8rd.
Will—Trustees
—Discretion—
Distribution of
specific Articles.

A testator directed his executors to distribute between his wife and sons (of whom there were six) such portions of his plate, &c., as they should judge expedient, and to sell the rest. The will carried the proceeds of such sale to three of the sons to whom the residue was left in equal shares. The only executor who proved was one of the sons, who distributed portions of the plate, &c., unequally, taking the largest share himself. The distribution, however, was made in accordance with a letter written by the testator, and with the consent of the adults interested, and of one of the guardians of the infants, and the bona fides of the distribution was not questioned:—*Held*, that the distribution was authorised by the will.

CASES IN CHANCERY.

1863.

DAVIS

v.

DAVIS.

Statement.

George Decimus Davis, his son *Matthew Boulton Davis*, and *J. W. Malcolm* executors and trustees, and appointed the said *George Decimus Davis*, *Francis Richard Davis*, and *Edwin Davis* guardians of his children.

The testator died on November 24th, 1861, leaving a widow and six sons, of whom two, *R. G. Davis* and the said *Matthew Boulton Davis*, were of age, and four others, viz. *G. W. Davis*, *M. H. Davis*, *Francis Robert Davis*, and the Plaintiff, were and still continued infants.

The will was proved by *Matthew Boulton Davis* alone, who made a distribution as to which the Chief Clerk certified as follows:—"The Defendant *Matthew Boulton Davis*, claiming under the will of the said testator to have the sole right of selecting and distributing the testator's plate, pictures, books, and household linen as he in his sole discretion might think fit, has selected and distributed the testator's plate, pictures, books, and household linen mentioned in the schedule hereto between and amongst the late Defendant *Isabella Davis* (the widow), and the testator's sons respectively, in manner set forth in the said schedule.

"Such distribution was made by the Defendant *Matthew Boulton Davis* in terms of a letter in the handwriting of the testator, and with the consent of the late Defendant *George Decimus Davis* as one of the guardians of the testator's sons *G. W. Davis*, *M. H. Davis*, *Francis Robert Davis*, and the Plaintiff, and with the consent of *R. G. Davis*, the eldest son of the testator.

"All the rest of the testator's plate, linen, books, pictures, and effects were sold by *Matthew Boulton Davis*, and included in his accounts of the personal estate.

"As by the before-mentioned distribution of the testator's plate, pictures, books, and household linen, the shares of the testator's sons therein are not of equal value, the

Plaintiff contends, that, according to the true construction of the testator's will, such portions of the said plate, pictures, books, and household linen as the said Defendant *Matthew Boulton Davis* selected for division, ought to have been divided between the testator's wife and his six sons in equal proportions, and that it would be proper so to divide the same; and if that is not practicable the whole should be sold and the money arising from the sale equally divided between the late widow and the said six sons of the testator. The question of the proper distribution of such plate, pictures, books, and household linen is at the request of all the parties reserved for the consideration of the Court."

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v.
DAVIS.
Statement.

By the schedule, it appeared that something was allotted to each of the widow and the six sons, the largest share of the plate being allotted to the executor himself.

The cause now came on upon further consideration.

Mr. Giffard, Q.C., and Mr. B. B. Rogers, for the Plaintiff:—

Argument.

We do not question the bona fides of the division; but the discretion given to the executors was only to say how much was to be divided in specie, and how much to be sold. It did not authorise an allotment of mere trifles to some of the sons, while the bulk of the plate is taken by the executor himself. The division ought to be equal as nearly as may be.

Mr. James, Q.C., and Mr. Bagshawe, for the executor:—

It is impossible to divide specific articles equally, especially where they have a pretium affectionis, which is obviously the character of these articles, and the reason for reserving them out of a sale. There is no power of making a valuation, and allowing anything by way of owelty; and if the Court holds that the distribution is to be in shares of

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v.
DAVIS.*Argument.*

equal value, it can only effectuate that by directing a sale, the very thing which the testator intended to prevent with respect to such particulars as the executors should select.

The words give a discretion not only to say which articles shall be reserved from the sale, but also what portion shall go to each of the widow and sons. The plural word 'portions' shows this, though it is true that the plural is unnecessarily used where the word occurs again.

There is clearly an absolute discretion given, and the only question for the Court is, whether it has been exercised bona fide. The facts found by the certificate establish this, and, indeed, it is not disputed. The distribution made must, therefore, be supported. It is to be observed, also, that though the proceeds of a sale would be divided equally as part of the residue, they would go to three sons only, whereas the articles retained were to be divided among the widow and six sons. No inference as to equality, therefore, can be drawn from the equal division of the residue.

[The VICE-CHANCELLOR mentioned *Kavanagh v. Morland (a)*.]

Mr. *James*.—The gift there was "share and share alike," and the power to distribute was only a power of partition.

Mr. *Giffard* replied.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The certificate removes all doubt as to the bona fides of the distribution, and I think it is within the authority given by the will. There will, therefore, be a declaration, that, according to the true construction, the allotment mentioned in the certificate was authorised by the will.

(a) *Kay*, 16, 27.

1863.

Post 267.45

WOOLLAM v. RATCLIFF.

THIS was the Hearing of the cause.

The witnesses on both sides were examined in open Court, and the result of the evidence, so far as material, was as follows :—

The Plaintiff and Defendant were both large silk throwsters.

The Plaintiff was in the habit of making up his bundles of silk in a particular form, with forty-eight heads of silk in each bundle, tied with five strings in different places, with the silk protected from the knots of the strings by pieces of foolscap paper of a particular form, the heads of silk being themselves tied with silken strings of different colours to mark the quality of silk ; and he used to place under the centre string of each bundle a label in a particular form, describing the quality of silk, and containing the following particular mark,—St. A*****,—which represented *St. Alban's* the place where the Plaintiff's manufactory was, and which was well-known in the trade as the Plaintiff's trade mark.

In the latter part of last year the Defendant made up a quantity of silk in bundles in exact imitation of the Plaintiff's bundles, and affixed to them a label exactly like that of the Plaintiff, except that the mark St. A***** was omitted.

These bundles were sent by the Defendant to *Eaton's*, who was proved to be one of the largest silk brokers in *England*, for exportation to the order of one *Young*.

Eaton, in December, informed the Plaintiff of this fact, and this Bill was thereupon filed.

May 26th &
27th.

Trade Mark.

It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed ; it is sufficient that the Court should be satisfied that there was, on the whole, a fraudulent intention of palming off the Defendant's goods as those of the Plaintiff. But, in such a case, it is essential that the imitation should be necessarily calculated to deceive ; and where it did not appear that any one had been, in fact, deceived, and a material part of the Plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere.

1863.
 WOOLLAM
 v.
 RATCLIFF.
 —
Statement.

The Plaintiff stated that the St. A***** was usually covered by the strings, so as not to be readily seen by a purchaser; and that in the foreign market, where his goods had the largest sale, that mark would not be relied on.

The Defendant stated, in cross-examination, that he had received an order from *Young* to supply him with silk made up to match a particular bundle then sent him (which was admittedly one of the Plaintiff's bundles,) with the exception of the trade mark, and that he had made up the silk in question in obedience to that order.

Young was not produced by either party.

A great number of witnesses engaged in the silk trade were examined, who all deposed that the label was an essential part of the making up; and it appeared that none of them would have mistaken any silk for that of the Plaintiff, without seeing the St. A***** on the bundle.

No evidence was given to shew that any one had, in fact, taken any of the Defendant's silk in mistake for that of the Plaintiff.

Argument.

Mr. *Giffard*, Q.C., and Mr. *Freeling*, for the Plaintiff.

Mr. *Rolt*, Q.C., and Mr. *W. Pearson*, for the Defendant:—

We have not imitated their trade mark. Any one may tie up bundles of silk as we do; and throwsters generally, as we did in this instance, tie up their bundles to order.

No one could tell the Plaintiff's bundles apart from others except by the trade mark, which we have not imitated.

The fact that we went to *Eaton's* is in itself a proof of bona fides.

If the Plaintiff had applied to us before suit, we would have satisfied him that we were not injuring him.

Mr. Giffard, Q.C., in reply :—

There would have been no object in our applying to the Defendants : we should merely have been misled.

If *Ratcliff* can establish his bona fides, he may recover his costs from *Young* as damages.

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WOOLLAM
v.
RATCLIFF.

Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This is a very singular case. I have had considerable experience in cases of trade mark, sometimes of trade mark simpliciter, sometimes of trade mark as one of numerous indicia that a particular thing is the manufacture of a particular person.

Judgment.

I have before me the case of the *Omnibus Companies* (a), where the words "Conveyance Company," the green omnibus, &c., were held sufficient together to entitle the Plaintiffs to an injunction. The Defendants might have had those words painted on a yellow omnibus without objection, and so of the other resemblances : the wrong lay in their accumulation, not in any one of them alone.

In this case the Plaintiff has a peculiar mode of making up his goods. This is not precisely a trade mark. He says "My goods are always made up in a particular form, better ascertained by the eye than by any description. I have always had five strings, and have strings of certain colours and other particular marks." It is no answer to this to say that other persons have used each of these things separately ; the question is, have they met together in any other instance ? Nothing has been produced in Court at all like the Plaintiff's goods.

Then it is said "The Plaintiff has a very striking mark

(a) *Knoll v. Morgan*, 2 Keen, 213.

1863.
 WOOLLAM
 v.
 RATCLIFF.
 ———
Judgment.

by which any one could at once be satisfied whether any particular goods were supplied by the Plaintiff or not ; and we have not attempted to imitate that mark. This would be no answer if I had any proved instance in which goods supplied by the Defendant had been actually sold as the goods of the Plaintiff, a case which might very well have happened, at least in the foreign market. It might well be, that persons who had been in the habit of selling the Plaintiff's goods might, in the foreign market, have for a time palmed off imitations of this sort as being the Plaintiff's manufacture. I think it has been established that in the *English* market the St. A***** would have been necessary and sufficient as indicia of the Plaintiff's goods ; and I do not think that in its absence any goods could have been sold in *England* as the manufacture of the Plaintiff, more especially as I do not think the Plaintiff has made out his case as to this mark being ordinarily covered by the centre strings.

On the other hand, there is the express direction to the Defendant to imitate the Plaintiff's bundle. This is of course always an element of suspicion ; but I cannot treat it as conclusive. I think that there might be cases in which no man could doubt that the object of the imitation was to deceive, but it requires very strong evidence indeed to raise such a case. In *Farina v. Silverlock* (a), it seemed to me that there could be but one reason for manufacturing the labels which were complained of, and that that reason was to cheat, and I therefore thought myself justified in interfering by injunction ; but the Lord Chancellor (b) thought that they might possibly be required for renewing old worn out labels on genuine bottles, and he sent the case to a jury. That shows how very anxious this Court is not to presume a fraudulent intention unnecessarily ; and although

(a) 1 K. & J. 509.

(b) 6 D. M. G. 214.

I find it hard to understand *Young's* order, if it was given for any honest purpose, I have this difficulty, that I do not believe that any one, at least in *England*, would have been in fact deceived in the absence of the special trade mark.

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 WOOLLAM
 v.
 RATCLIFF.
 Judgment.

Two explanations of this order have been attempted, but neither of them is satisfactory to my mind. It is in the first place said to be customary for silk throwsters to make up their goods according to the fancy of their customers. This may be true in the case of some persons just commencing business; but I do not think it can be the regular course of business of large firms. Local customs they would of course observe,—the north of *England* custom, for instance,—and perfectly honest variations might be adopted; but no man in a large way of business could possibly be expected to alter his method of making up for each particular order. Besides, and this has pressed me very much, I cannot conceive any bona fide reason for ordering a new label, so like the Plaintiff's, so different from that which the Defendant had previously used, and this coupled with an accurate imitation of all the Plaintiff's other peculiarities.

A second attempt at explanation is that suggested by Mr. *Rolt*, that *Young* might have supplied part of an order from the Plaintiff's silk, and might have wished the rest of the order to correspond. But why should his customers have expected the rest of the silk to be made up similarly to the first supply, unless they thought it came from the same hand? Still, I have no evidence that any one has been in fact deceived, and I do not think myself justified in assuming that such has been the case.

The question of costs turns on the consideration whether *Ratcliff* has or not acted bona fide in the matter. I find much in the facts of the case raising considerable doubt on this point; but I also find conduct on his part leading to a

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 —
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contrary conclusion. I must give him the benefit of the doubt. I think he acted inconsiderately, but not, as I suppose, dishonestly, when I find that he went at once to *Eaton*, who must have recognised the imitation, who has been cross-examined, and has given his evidence in the fairest possible manner, and through whom the Plaintiff actually learnt what had been done.

It further appears that *Eaton* had given this information to the Plaintiff so long ago as December last; and the Plaintiff ought therefore to have done one of two things: either he should have communicated at once with *Ratcliff* and obtained from him the explanation which he has given here; or else, if he determined on applying to this Court in the first instance, he should have taken care to show that some one had been in fact deceived.

I think *Ratcliff* has acted very hastily, very indiscreetly; but I think that no case is made sufficient to call for an injunction, and that he is entitled to the benefit of the doubt I feel as to his conduct; more especially as the Plaintiff, by simply pursuing his inquiries, might have made himself safe.

I must therefore dismiss this bill with costs.

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BATTY v. HILL.

May 28th.
 Trade Mark—
 False Representation—
 Prize Medal.

THIS was a motion for an injunction to restrain the Defendant *Hill* from placing on his goods the words "Prize Medal, 1862," and from in any manner representing or This Court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the Plaintiff.

The persons to whom prize medals have been awarded by the Commissioners of the International Exhibition, have not ipso facto any special property in the nature of a trade mark in the words "prize medal."

Therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "Prize Medal, 1862," this Court refused to interfere at the instance of a person who had obtained such a medal.

inducing persons to believe, or endeavouring so to do, that he had gained, in respect of his goods, a prize medal from the International Exhibition, 1862, and from in any other way infringing the Plaintiff's trade mark, or depriving the Plaintiff of the benefit of the grant of the medal to him.

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The Plaintiff and Defendant were both Pickle-merchants.

The Plaintiff had obtained from the jurors of the International Exhibition one of the prize medals awarded by them for "Pickles and Preserved Fruits."

The Defendant *Hill* had supplied the refreshment department at the Exhibition with pickles, but had not been an exhibitor thereat, nor had he obtained any prize medal.

In June last, before the awards had been made, the Defendant *Hill* had labels prepared, bearing the words "Prize Medal, 1862;" and from the moment that the awards were made he issued his bottles bearing such labels, and he also placed those words in a conspicuous manner on the cases in which he exported his pickles to various places, principally in *Australia*.

The Plaintiff, shortly after the issue of the awards of the jury, had fresh labels struck for his pickle bottles, bearing a representation of his medal and the words "International Exhibition, Prize Medal, 1862;" and he thenceforth issued his goods with these labels affixed; and he stated that his pickles had acquired a high reputation both in *European* and colonial markets in connection with this medal; and that the representation made by the Defendant was altogether false, and calculated to obtain for his goods the benefit of the reputation which attached to the medal and to the Plaintiff's goods, which were extensively known in this country and abroad in connection therewith.

The Plaintiff also alleged that the sale of his goods had

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been injured by the use by the Defendant of these words; and that such words caused many persons (especially in the colonies, where the names of the persons to whom medals had been awarded were not so well known as here,) to mistake the goods of the Defendant for those "which were known in connection with the medal," particularly those of the Plaintiff.

It appeared that there had been but two medals in all awarded for pickles, of which the Plaintiff had obtained one, and the Defendant *Partridge* the other. *Partridge* had never used the words "Prize Medal" on his labels; but the Plaintiff alleged that he was interested in the question, and injured by the wrongful act of the Defendant.

The Plaintiff's affidavit contained the following passage:—

"I believe that my goods have become and are extensively known and distinguished in the colonies and abroad, and also in this country, by means of and in connection with the said medal; and I believe that my goods have acquired and now enjoy a great additional reputation by reason and means of such medal, especially by reason of my being (except *Partridge*) the only person who received such medal for pickles."

The Defendant denied that he had imitated the Plaintiff's trade mark; denied that the Plaintiff's goods had any higher reputation than his own; and denied that the Plaintiff had been injured.

It appeared that the Defendant had been at one time in the employment of the Plaintiff, and an attempt was made to show a former imitation of the Plaintiff's labels by him; but the evidence on this point failed.

Sir *Hugh Cairns*, Q.C., and Mr. *Bagshawe*, for the motion :—

This is a most unjustifiable falsehood on the part of the Defendant, and, if permitted, is calculated to destroy the value of all such distinctions as this medal is.

The Plaintiff is peculiarly interested, not only because he is thereby deprived of the advantage of the guarantee of the pre-eminence of his goods, which is implied in the award of the jurors, but also because his goods have a high reputation in connection with this medal; and the Defendant's goods are likely to be mistaken for his in consequence of this falsehood.

At any rate, your Honour will grant the injunction till the Hearing: the balance of convenience is entirely in our favour.

Mr. *Giffard*, Q.C., and Mr. *Goldsmith*, contra :—

This is not a case of trade mark; not nearly so strong a case as that in which your Honour refused to interfere yesterday (a). Our labels are not the least like the Plaintiff's; and that which constitutes his trade mark is his signature, which is not infringed; and our own name is on every side of our bottles.

Our pickles bear a higher price in the market than those of the Plaintiff: we should therefore be injured, not benefited, by our goods being mistaken for his.

Sir *Hugh Cairns*, in reply :—

The Bill is not founded on trade mark. We claim a special property in this mark, to which we and one other (the Defendant *Partridge*), and no one else, have a right.

(a) *Woollam v. Ratcliff*, ante, p. 259.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

I ought to be careful as to acting in this case. On the question of balance of convenience I should be decidedly in favour of the Plaintiff; the inconvenience to the Defendant would be merely the necessity of telling the truth. It is however no part of the duty of this Court to enforce the observance of the dictates of morality; and though the old maxim,

"Rem facias, rem,

"Si possis, recte; si non, quocunque modo, rem (a),

seems to apply in full force to modern times, I can only interfere when some private right is thereby infringed.

If there had been anything of substance in the supposed previous imitation of the Plaintiff's marks, I should have given great weight to the fact that the Defendant has now had recourse to this falsehood; I should have treated that as a strong ingredient in the consideration of the whole question, and I should in such case have felt greatly inclined to restrain him now from continuing a representation which is obviously unjustifiable in itself.

But, as I have come to the conclusion that there is no substance whatever in the charge of a previous attempt to pass off the Defendant's goods as the Plaintiff's, I must deal with the present case without the only element which would enable me to make the order which is now applied for.

The labels issued by the Defendant are very different from those of the Plaintiff in many respects; and even their similarities are only general resemblances, without any special appearance of imitation of the Plaintiff's labels: but then he has superadded to those labels this representation, which the Plaintiff has also added to his; the difference being that the representation is true on the part of the Plaintiff, false on that of the Defendant. On that point

(a) Hor. Ep. I. i. 65.

there arises, as I have said, a presumption against the Defendant; but he must be held entitled to use these labels, false though they be, if they do not interfere with the Plaintiff's rights.

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The Bill has been filed in a way which halts between two distinct equities, neither of which is, I think, sufficiently made out.

It is obvious that this Court cannot interfere simply on the ground that this is a misrepresentation; and accordingly the Plaintiff's counsel have relied upon a supposed special property in these words, vested, either in the Plaintiff personally, or in all the persons who have really obtained prize medals.

If the Plaintiff's goods had really acquired a reputation abroad under the name of "Prize Medal Pickles," there would be great reason to think that the Defendant was interfering with what would amount to a trade mark in this sense, that persons buying pickles under that name would suppose that they were purchasing the Plaintiff's manufacture.

Accordingly, I only called on the Defendant's counsel in consequence of the averment in the Bill that "the Defendant had gained the benefit of the reputation which attached to the medal" (that could have nothing to do with the case) "and to the Plaintiff's goods which were and are extensively known in connection therewith." Is it meant to say that when "Prize Medal Pickles" are asked for, the Plaintiff's pickles would be produced, or is it merely that the Plaintiff's goods are better known and liked in connection with the medal?

The Defendant does not meet this averment, which I therefore accept as true, *valeat quantum*; but then it appears that he had issued his pickles with this label on them before the Plaintiff had added, or been in a position properly to add these words to his label, which in itself is a circum-

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stance that would render it very difficult for the Court to interfere. The Plaintiff naturally waited till he was entitled to use these words before having his labels prepared, a restraint by which the Defendant did not feel himself bound.

Then there is this additional difficulty, the Plaintiff brings before the Court a gentleman, who, like himself, has got a prize medal ; but who, unlike him, has not affixed any mention of this fact to his wares. If these words constitute a trade mark of the Plaintiff's, even in the secondary sense, it would follow that *Partridge*, who had an original right to use these words, but who has not done so, would be liable to be restrained from doing so now.

Now apply this to the case of oils : I find that thirty different persons have been awarded prize medals in that branch ; and it would be quite idle to talk of the term "Prize Medal Oils," as representing any one person's goods.

In this aspect the case is something like *Dent's case*, which came before me some time ago (*a*). In that case two firms both claimed through the same person, who was the person to whose manufacture the reputation attached, and I thought that they were entitled to come here separately to restrain a third person from usurping the benefit of that reputation. I do not think that there was any appeal or any further proceedings in that case, which I may therefore assume to have been rightly decided ; but the principle there involved could not be applied to the case of thirty persons who had all obtained prize medals for oils.

If it had been shown that an order for "Prize Medal Pickles" would in the trade be answered by supplying the Plaintiff's pickles, there might be some foundation for the interference of the Court ; but this case falls very far short of it, because that depends upon the presumption that the purchaser

(a) *Dent v. Turpin*, 2 J. & H. 139.

does not know the name of the merchant, and rests entirely on the reputation acquired by the particular goods; whereas I have here merely the fact, that two persons have put the same mark on their goods, the one rightly, the other falsely.

I can make no order on this motion. Costs to be costs in the cause.

Since this Judgment was delivered, and partly in consequence thereof, a special Act of Parliament (a) has been passed for the prevention of this particular fraud.

(a) "The Exhibition Medals Act, sent to the Commons 28rd July, received 1863," brought into the House of Lords the Royal Assent 28th July, by the Marquis of Clanricarde 20th July,

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THE LEATHER CLOTH COMPANY (LIMITED)
v. THE AMERICAN LEATHER CLOTH
COMPANY (LIMITED).

THE article known as "leather cloth" is an *American* invention, originally due to *Caleb Pearson Crockett*. *Caleb Pearson Crockett* and *John R. Crockett*, for some time after the first invention, carried on business as leather cloth manufacturers at *Newark, New Jersey*, under the firm of *J. R. & C. P. Crockett*.

In the year 1854, *J. R. & C. P. Crockett* employed the firm of *Dodge, Bacon, & Co.*, which consisted of three persons, named respectively *Dodge, Bacon*, and *Giandonati*, as their agents in *England*; and through their means "*Crockett's Leather Cloth*" became a well-known article of commerce in this country.

The two firms of *J. R. & C. P. Crockett*, and *Dodge, Bacon*,

mark (out of *England*) is retained by the assignors.

Where a trade mark has once been legitimately acquired, an altered state of circumstances rendering the specific assertions appearing on the face of the trade mark no longer true, will not render the use of such mark improper.

Although a statement in his trade mark, which is false ab initio, will in general deprive the Plaintiff of all right to relief, this principle does not apply to a case where the falsehood in question was not reasonably calculated to deceive.

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July 7th & 8th.
Trade Mark—
Assignment—
Injunction—
False Representation.

Although a trade mark is not "property" properly so called, yet when a business is bona fide assigned, the exclusive right to use a trade mark which has been appropriated to that business may be assigned along with it. And this principle applies even where the right to use the same trade

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& Co., were afterwards amalgamated, and the joint firm assumed the style of *J. R. & C. P. Crockett & Co.*

In the year 1855, this last-named firm was dissolved; and thereupon *J. R. Crockett, C. P. Crockett, and Bacon*, together with three other persons, formed a Company under the style of "*The Crockett International Leather Cloth Company.*" The business previously carried on by *J. R. & C. P. Crockett & Co.* was transferred to this Company, which carried on business in *America* at *Newark* aforesaid as a chartered Company, and in *England* at *West Ham* as a common partnership.

In January, 1856, *Dodge* took out a patent for tanning leather cloth, which patent he immediately afterwards assigned to the *International Company*; and that Company thereupon assumed the following trade mark, which they affixed to all their "first quality goods:"—



It was admitted that this trade mark had from the outset been applied to untanned, and therefore unpatented, goods, as well as to the tanned goods.

There was some dispute as to the quantity of tanned cloth which had been manufactured, the Defendants alleging that such cloth had proved a complete failure, and that the *International Company* had almost immediately abandoned its manufacture; the Plaintiffs, on the contrary, asserting that a large quantity had at all times since the patent been made, and in particular that the *London*,

Brighton, and South Coast Railway Company never used the untanned cloth. They likewise asserted that the tanned goods bore a higher price in the market.

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It was, however, admitted that at no time had the tanned cloth exceeded one-tenth of the entire quantity of first quality goods sold by the *International Company*, or by the Plaintiffs as their successors.

Dodge had also taken out a patent for the machinery used in the manufacture; but it was admitted that this had no effect on any of the questions in the cause.

Both patents had been suffered to expire.

On the 21st May, 1857, an agreement was entered into between *Bacon, Dodge, and Giandonati* (as such partners of the extinct firm of *J. R. & C. P. Crockett & Co.* as aforesaid,) and one *Lorsont* (who had brought about this agreement, and who was now the Plaintiffs' foreman,) and *C. P. Crockett* (as agent for the *International Company*,) of the one part, and *John Murray* (then acting as agent for the intended *Leather Cloth Company*, the Plaintiffs in this suit, and now their solicitor,) of the other part, whereby the parties of the first part agreed to sell to the Plaintiffs their letters patent in *England* and *France*, and the exclusive right of taking out similar patents in the rest of *Europe*, and all their processes of manufacture, and all their lands, factory works, plant, and other property at *West Ham*, at the price of £20,000.

The said agreement contained the following clause:—

“That the parties of the first part, or any of them, will not directly or indirectly carry on, nor will they to the best of their power allow to be carried on by others, in any part of *Europe*, any company or manufactory having for its object the manufacture or sale of productions in any way similar to the productions which are the subject of the

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said letters patent, and now manufactured in the business or manufactory so carried on at *West Ham* as aforesaid, and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the said intended Company of the benefits hereby agreed to be purchased."

By one of the deeds, which was executed to carry this agreement into effect, the goodwill of the business at *West Ham*, and the right of using the trade mark as the same had been used at *West Ham*, were assigned to the Plaintiffs; but such deed contained no covenant preventing the *International Company* from the use of the name of *Crockett & Co.*

Upon the said purchase being completed, the Plaintiffs immediately adopted the said trade mark, and they have ever since continued to use it on all first quality goods indiscriminately, just as the *Crockett International Company* had done before them.

The *International Company* continued for a short time to carry on business in *America*; but in the course of the same year, 1857, they entirely discontinued business, and the *American* branch of this trade was assigned to a new Company, called "*The Crockett Leather Cloth Company*," which was (except as to one agency at *Leipsic*) an exclusively *American Company*.

Some evidence was given on the part of the Defendants, to show that the *Crockett Company* had an agent, one Mr. *Kohnstamm*, in *London*, and had a regular depôt for their goods there; but *Kohnstamm* himself made an affidavit on behalf of the Plaintiffs, by which it appeared that he had not acted as an agent at all, but had, as a speculation of his own, bought the goods of the *Crockett Company* (amongst others) on his own account, for resale in *England*.

The trade mark adopted by the *Crockett Company*, and by which their goods were known, was the following:—



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Shortly after the sale of the *West Ham* business to the Plaintiffs, *Dodge & Giandonati* commenced business in the *Old Kent Road* as manufacturers of Leather Cloth, which they described as "*Crockett's Leather Cloth*."

The Plaintiffs thereupon filed a Bill, and obtained an injunction restraining them from holding themselves out as being agents for or connected with the sale of *Crockett's Leather Cloth*, or otherwise using the name of *Crockett* in their business.

Dodge & Giandonati shortly afterwards became bankrupt.

The Defendants were a Company incorporated in the month of August, 1861; and they carried on business in the *Old Kent Road*, on the premises formerly occupied by *Dodge & Giandonati*.

The Defendants had adopted a device as a trade mark for their first quality goods, which the Plaintiffs complained of as an interference with their right to the exclusive benefit of their trade mark before described. Such device was as follows:—



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The trade marks used upon their second quality goods by the Plaintiffs and Defendants respectively, were as follows:—

By the Plaintiffs :—

By the Defendants :—



Some reliance was in the pleadings placed on the resemblance of these marks ; but the arguments turned almost exclusively on the marks affixed to first quality goods.

The Defendants had also issued Price Current Lists, in which they had annexed to the different colours of leather cloth numbers identically corresponding to the numbers annexed to the same colours in the Trade Price Current Lists of the Plaintiffs ; and they asserted that they were entitled so to do, and that such numbers were generally used in connection with such colours by the trade at large, all over *Europe* and *America* ; and this was substantially admitted by the Plaintiffs.

The Defendants justified the representations made in their first quality trade mark by showing that Mr. *Wegelin*, their manager, had been in the employment of *Crockett's International Company* from December, 1856, to May, 1857. Mr. *Wegelin* left the employment of the Defendants in April, 1862, and thereupon Mr. *Thomas* became the manager. Mr. *Thomas* stated that he also had been in the employment of *J. R. & C. P. Crockett & Co.*, but upon cross examination it appeared that he had been so only in so far as that was implied in the fact that he had been in the service of *Dodge* during the time, or part of the time, when *Dodge* was a partner of the *Crocketts*.

The Defendants further objected that the Plaintiffs were deceiving the public by affixing a mark with the word "patented" upon it to unpatented goods; and they produced affidavits from several shopkeepers, upholsterers, and furniture dealers, who said that if the article were not patent they had been grossly deceived, and had deceived their customers. Several of these deponents said that they had paid a higher price for the cloth in consequence of believing it to be a patent article, and two of the affidavits contained the following clause:—

"If the said *American* leather cloth be not patented, I have been grossly deceived thereby, and have paid several shillings per piece unnecessarily and improperly, as other cloth would have answered my purpose equally well."

The Plaintiffs adduced evidence to show that when "*Crockett's Cloth*" had been asked for, the cloth of the Defendants had been supplied; while the Defendants on the other hand relied on the dissimilarity of the trade marks as negating any supposed attempt at fraudulent imitation.

There was also the usual contest as to whether the Plaintiffs' cloth had or had not any intrinsic superiority over the Defendants'.

On the 7th of February, 1862, an injunction was moved for in the suit; when the Vice-Chancellor declined to make any order on the motion, but made the costs costs in the cause, leaving the Plaintiffs to establish their case at the Hearing as they could.

The cause now came on for Hearing.

Mr. *Dickinson* (Sir *Hugh Cairns*, Q. C., with him) for the Plaintiffs:—

This case is virtually governed by *Leather Cloth Co. v.*

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Hirschfeld (a), where all the points raised in this case were discussed and decided in our favour.

Those points are three in number :

1st. That we have no exclusive right to this trade mark, and that such trade mark belongs as much to every member of the old firm of *Crocketts & Co.* as to us.

But this is not so ; *Crocketts* do not carry on any business in *Europe* ; and if they did, we could restrain them from the use of this mark : *Churton v. Douglas (b)*, *Collins Co. v. Brown (c)*, *Collins Co. v. Cowen (d)*. All persons who had any right to use this trade mark concurred in the assignment to us.

This case is not within the principle of *Hall v. Barrows (e)*, because there the question was, whether the Court would itself order a sale of the trade mark, i. e., whether it was *property*, which it admittedly is not.

In *Bury v. Bedford (f)*, it was only decided that the owner of a trade mark could not sell it twice.

2nd. They say that we are disentitled to sue because we affix the word "patented" to unpatented goods.

But we only do so in connection with the word "tanned," and the tanned goods are patented. It is no objection that the patent has expired : *Edelsten v. Vick (g)* ; though it would be different if we never had had one : *Flavel v. Harrison (h)*. Any one can tell whether the goods are tanned or not ; and they have notice on the face of the stamp that the untanned goods are not patented.

3rd. They say that they have not told any untruth, and not imitated our labels.

The untruth is evident ; they lead the public to believe that *Wegelin* or *Thomas* was manager to the *Crocketts*, whereas

(a) 1 N. R. 551.

(b) Joh. 174.

(c) 3 K. & J. 423.

(d) Id. 423.

(e) 11 W. R. 525.

(f) 1 N. R. 5.

(g) 11 Hare, 78.

(h) 10 Hare, 467.

neither of them ever had any real connection with the *Crocketts* in the business.

[The VICE-CHANCELLOR.—In whatever capacity either of these gentlemen may have been with the *Crocketts*, they have a right to say ‘late with *Crockett*,’ provided they have sufficiently distinguished their stamp from yours.]

Mr. *Dickinson*.—That they have not done so is evident. The whole thing is an attempt to get the benefit of the name of *Crockett*, to which they are not entitled.

Mr. *Rolt*, Q.C., and Mr. *Fischer* for the Defendants :—

To make any order in this case would be to carry the principle further than has ever yet been done.

The caution with which the Court proceeds in these cases, and the care which it takes not rashly to extend its principles of action, are shewn by the cases of *Blanchard v. Hill*(a), and *Motley v. Downman*(b).

There are four objections to the Bill :

1st. This is not the case of a Plaintiff coming to ask the Court to restrain the Defendant from passing off his goods as the goods of the Plaintiff, but of a Plaintiff asking the Court to enable him to pass off his goods as those of a third party. This has not been done, and will not be done : *Hall v. Barrows* (c), *Harper v. Pearson* (d).

The right to this name would be in *Giandonati*, who assents to our use of it : *Webster v. Webster* (e).

[The VICE-CHANCELLOR referred to *Croft v. Day* (f).]

Mr. *Rolt*.—That was a case of close imitation, and the Plaintiffs had a right as executors representing the estate.

2nd. There is really no imitation ; our cloth is not re-

(a) 2 Atk. 484.

(b) 3 My. & Cr. 1.

(c) Ubi sup.

(d) 3 L. T. 547.

(e) 3 Swanst. 490, n.

(f) 7 Beav. 84.

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presented to be *Crocketts'*; our trade mark is perfectly distinct, and not more like that of the Plaintiffs than necessarily arises from the nature of the business.

3rd. This is one of the grossest deceptions on the part of the Plaintiffs which has ever been attempted. The patent never was intended for anything except a blind. The unpatented article has been most successful; the patented article is not only no improvement, but it has been practically unused. Then the Plaintiffs, by the use of this stamp, which untruly asserts unpatented goods to be patent goods, have extracted from a number of persons a higher price than their wares could otherwise have commanded; and their only defence for this conduct is, that the deception is so gross that it could not deceive any but the most gullible. If that were so it would be no defence, but it is not so; you cannot impute knowledge of the peculiarities of tanned cloth to all purchasers.

4th. The Plaintiffs have not acquired any right to use the name of *Crocketts* as distinguished from "*International Company*." The right, whatever it may have been, which they obtained from that Company, would not give them an exclusive right as against the other partners in the expired firm of *Crocketts & Co.* *Giandonati* swears that he never assigned his right to use the name either to the *International Company* or the Plaintiffs. The *Crockett Co.* in *America* use the name in defiance of the Plaintiffs, and send their goods over here for sale.

[The VICE-CHANCELLOR to Mr. *Dickinson*.—The only difficulty I have is, that you have deceived the public by stamping cloth, which is neither tanned nor patented, with a mark which asserts it to be both. You may confine your reply to the question whether I ought not to act upon the principle of *Flavel v. Harrison* (a).]

(a) *Ubi sup.*

Mr. Dickinson in reply :—

The evidence nowhere says that any of the witnesses went to the Plaintiffs and asked them for leather cloth, and that on being handed the first quality cloth they consented to give a larger price for the same article than they would have given had they known that the article was not patented, or that they gave Plaintiffs a larger price than they would have given to a vendor of unpatented cloth; and if they merely mean that they purchased the Plaintiffs' article rather than that of other manufacturers because it was a better article, and that they attributed that superiority to its being patented, that is not a fraud on any one; and where persons are found to assert, as two gentlemen do, that they, wholesale dealers, gave a larger price for an article merely because they thought it was patented, when they could have got another, unpatented, article at a lower price which would have suited them as well, that is not worthy of belief. A patent by creating a monopoly raises the price; but if it be known that there is no monopoly, the patent will have no such effect.

That the patent was not a mere trick is clear from the evidence that the *London, Brighton, and South Coast Railway* will not have the untanned cloth.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question raised in this case has come before me on several occasions, on all of which it has been very fully and ably discussed, and never more so than in this suit, in which some points of considerable importance are involved.

July 8th.
Judgment.

A firm of *J. R. & C. P. Crockett*, who seem to have been the inventors in *America* of the manufacture known as leather cloth, employed a firm at *West Ham* as their agents

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for the manufacture and sale of the article. After a time certain changes took place in the constitution of Messrs. *Crockett's* firm, and I take it to be proved, on the part of the Defendants, that Mr. *Giandonati*, as representing the *London* house of which he was a member, became a partner in the *American* firm, and continued in that position during part of the years 1854 and 1855.

In the latter year Messrs. *Crockett* dissolved the existing partnership, and, in conjunction with some other persons, formed a company which was duly incorporated in the month of October, 1855, according to the *American* law, by the name of *The Crockett International Leather Cloth Company*. Shortly after this Mr. *C. P. Crockett* came to *England* armed with a power of attorney from the *American* Company, with the view of selling the *English* works and business to a new Company intended to be established. The Plaintiffs' Company was accordingly formed for the purpose, and was duly registered on the 22nd of May, 1857. On the day before the registration an agreement was executed between the members of the then *West Ham* firm, Messrs. *Bacon*, *Dodge* and *Giandonati*, and Mr. *Lorsont* (who is now the Plaintiffs' manager,) and Mr. *C. P. Crockett*, of the one part, and Mr. *Murray* (now the Plaintiffs' solicitor,) of the other part.

Before this time certain *English* patents had been taken out by *Dodge* on behalf of the *International Company*, including among others a patent of the 14th January, 1856, for improvements in the manufacture by applying a process which they termed tanning to the cloth before applying the enamel.

By the agreement I have mentioned, the parties of the first part agreed with *Murray* that, in consideration of £20,000, these patents, including the tanning patent, and

all the ground works at *West Ham*, with the business there carried on, should be assigned to the new Company, and that the parties of the first part should not carry on, or directly or indirectly allow to be carried on, in *Europe* the manufacture of leather cloth; and further, that they would not communicate the secret of the process to any person so as in anyway to interfere with the exclusive enjoyment by the Plaintiffs of the benefits thereby assigned.

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After the formation of the Plaintiffs' Company this was followed by a formal deed, dated the 8th of July, 1857. *Dodge* (probably as the grantee of the patents) was the only member of the *West Ham* firm who was made a party to this deed, the other parties being the *International Company* of the second part, and the Plaintiffs' Company of the third part. By this instrument, the whole of the property mentioned in the agreement was assigned to the Plaintiffs' Company, together with the goodwill of the *West Ham* business, and the right to use the trade marks theretofore employed.

From that time the Plaintiffs' Company have made use of the trade marks which the *International Company* had previously used, and seem to have been the only persons who used those trade marks, or any others at all like them, until March, 1861, when the Defendants commenced the use of the marks which it is the object of this suit to restrain.

The history of the Defendants' Company is this:—They purchased a business for the manufacture and sale of leather cloth, which had been established in 1858 by *Dodge* and *Giandonati* in the *Old Kent Road*, and had been conducted by them up to this time without any reference to Messrs. *Crockett*, or any imitation of their trade marks. Having acquired this business, the Defendants proceeded to use the trade marks complained of.

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I have therefore to compare these trade marks, and I have also to consider, whether, having regard to the recent cases at the Rolls, which were pressed upon me in argument (a), I can hold that the Plaintiffs have any right in the old trade marks—whether, when parted with by those who originally employed them, they did not become open to all the world—whether, in fact, they had not ceased to denote the particular manufacture and business now carried on by the Plaintiffs' Company—and lastly, whether the Plaintiffs' right to relief is not barred by the circumstance that the trade mark referring to the tanning patent was affixed by them to a class of goods which had never been patented at all.

It is entirely beyond dispute that the business and manufacture to which the Plaintiffs have succeeded was carried on in the manner I have described—first, by *J. R. & C. P. Crockett* with the *West Ham* firm as their *English* agents, then by Messrs. *Crockett* in partnership with the *West Ham* firm, then by the *International Company*, and lastly, so far as the *English* business is concerned, by the Plaintiffs' Company. The Plaintiffs' trade mark shews on the face of it that it was used only since the formation of the *International Company*. It bears the words—“*Crockett International Leather Cloth Company, Newark, New Jersey, United States, and West Ham, Essex, England,*” and in the centre, “*J. R. & C. P. Crockett, Manufacturers;*” all which was perfectly true at the time when the mark was devised. Then comes the reference to the tanned leather cloth patent, in which I notice that the date is stated as Jan. 24th, instead of Jan. 14th. This mistake, however, is in no way material, because the description is sufficient to guide any one who searched the patent office to the patent of the 14th of January, 1856.

(a) *Hall v. Barrows*, and *Bury v. Bedford*, ubi sup.

The mark in this form was used before the transfer of the business to the Plaintiffs, and the deed grants to them the right to use this trade mark, a form of grant which is more accurate than one which should purport to assign the trade mark as though it were property.

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The first objection taken to the Plaintiffs' right is wholly irrespective of the merits or demerits of the Defendants. The point was more pressed on this occasion than when the case was previously before me, probably in consequence of the decision of the Master of the Rolls, which was supposed to be in point. It was argued that it was not possible to transfer the right to use a trade mark in the manner which has been here attempted; and for this reason, that the trade mark represents on the face of it that the goods on which it is impressed are goods manufactured by *J. R. & C. P. Crockett* and the *International Company*, and that the manufacture is at *Newark*, in the *United States*, whereas, in fact, the manufacture is no longer carried on by the persons or at the place so indicated: and it was urged that these misrepresentations render it impossible for the Court to give any assistance to the Plaintiffs for the protection of a trade mark by which they are thus deceiving the public.

The precise legal character of a trade mark is so clearly defined by Lord *Langdale's* judgment in *Perry v. Truefit* (a), that I prefer to use his words rather than my own:—"It does not seem to me that a man can acquire property merely in a name or mark; but whether he has or not a property in the name or the mark I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade or that custom, which, without

(a) 6 Beav. 66.

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that improper act, would have flowed to the person who first used or was alone in the habit of using the particular name or mark" (a).

Now every word of these observations applies accurately to the circumstances of this case. Then I find the Plaintiffs in undisputed enjoyment of the use of this trade mark, and I find that they were the only persons in *England* who had any right to use this name in connection with this article of commerce, and I find the Defendants using this same name, and I cannot doubt that they are using it "in order," in Lord *Langdale's* words, "to attract to themselves that custom, which, without that improper act, would have flowed to" the Plaintiffs.

In the same judgment Lord *Langdale* instances one of the class of cases in which a Plaintiff is deprived of the assistance of the Court by making fraudulent representations a part of his trade mark. His Lordship, after stating the circumstances in that case as they appear in the report (b), says this:—"I do not think it is a favourable case for the intervention of this Court, to say the least of it, when a party, having bought a secret invented by a Mr. *Leathart*, represents to his customers and the world that his 'admirable composition is made from an original receipt of the learned *Von Blumenbach*, and was recently presented to the proprietor by a near relation of that illustrious physiologist.'" Then he goes on:—"The Plaintiff also states a circumstance, not in the least supported by evidence, that the composition is formed of vegetable balsamic productions from *Mexico*. There are other things which I do not think it necessary to observe upon, which make me think this not a favourable case for a person to come in the first instance and claim the assistance

(a) Page 73.

(b) Page 72.

of a Court of Equity in aid of a legal right, which however I do not deny he may have."

I should observe that both in this case and in *Pidding v. How* (a) the Court did not absolutely refuse to assist the Plaintiff, though it did decline to do so until he had established his right at law.

All these cases of trade mark therefore turn not upon a question of property, but upon this—whether the act of the Defendant is such as to hold out his goods as the goods of the Plaintiff. It is observed, indeed, by Lord *Langdale* (b) that these questions do not turn wholly upon fraud, because this Court does not require the scienter to be proved, as it must be in an action for deceit (referring to *Millington v. Fox* (c), and that class of cases), but, on the contrary, will grant an injunction where no evil intent can be attributed to the Defendant. Even in such a case, however, the ground of the interference is still fraud.

There is this difference to be borne in mind between proceedings at law and in equity. A Court of law may well think a Defendant not liable to an action for an act done *absente animo malo*, and quite consistently with this a Court of Equity may hold that if he continue to do the act he will commit a fraud.

In reality therefore the jurisdiction does rest on the equity of preventing one person from committing a fraud on the rights of another.

The Master of the Rolls also suggests a case where the right to a trade mark does approach, though it does not quite attain to, the character of property; that is, where the designation of a manufacture is a sign of locality, as for example the name of a vineyard. In such a case I

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(a) 8 Sim. 477.

(b) 6 Beav. 73.

(c) 3 My. & Cr. 338.

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apprehend that the right to use a mark indicating the growth of a particular locality might possibly be held to pass by a sale of the estate. That is the case in which the right to a trade mark comes nearest to the idea of property.

In such a case, it may well be asked, how can a trade mark of the nature of a local designation be parted with? Could a person by purchasing a particular estate entitle himself to use the name of one vineyard to pass off the inferior produce of other vineyards also belonging to him? The Court will not allow any right of this description to be used in a wrongful manner so as to deceive the public. But a hypothetical case like this is very different from that before me. The question comes to this, whether a trade mark, which has been employed by a manufacturer for years to denote a particular article, and has become associated with that article, is no longer to be used or no longer to be protected when once the original manufacturer has retired from the business. I have frequently had occasion to consider this point; and it appears to me that I cannot so hold unless I am prepared to say that it is incompetent for a person retiring from business, after having acquired a reputation in trade, to allow his name to be used in the firm by which the business is continued. To say this, would be to condemn the constant practice of centuries.

Can it be suggested that the banking house of Messrs. *Childs* are committing a fraud on the public because there is no longer a partner of that name in the firm? Even in the case of solicitors, where so much turns upon personal capacity, nothing is more common than to retain in the firm the name of a deceased partner; and it would be a surprise to many respectable firms to be told that they were on this account disabled from recovering their costs.

I need scarcely add that the prohibition in the Solicitors' Act(a) is not pointed against such cases, but against the practice of a person who is not on the rolls carrying on business in the name of another who is so. It is clearly impossible to carry out a principle such as has been suggested.

Where on the sale of a trade the place of business continues the same, and the secret, if any, (and a secret is part of the property in this case,) is handed over, it would be impossible to say that the purchaser is not entitled to describe his articles by the name by which they have always been known.

What has been done in this case is nothing more, in substance, than writing over a shop-door the name of a person who has ceased to have any connection with the business; and certainly in such a case I should not hesitate to restrain other persons from copying that name. The shop may be well known, and it may be suggested that the public rely on the individual person whose name is over the door; but if this principle is to be acted upon, I must hold that whenever a partner retires it is essential that that fact should be notified to the public, or on default that any one in the world may appropriate the style of the firm.

Certainly, the Master of the Rolls in the cases cited to support this view does not go to any such length; and I am by no means prepared, in the absence of binding authority, to do so.

I hold therefore that the Plaintiffs, having purchased the business, are perfectly entitled to use the trade mark formerly used by their vendors. It is singular, too, that in point of fact this trade mark does indicate the successive transitions in the business.

(a) 6 & 7 Vict. c. 73, s. 32.

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I come now to another objection, or rather to the same objection in another shape. It is said that no one can come into this Court to assert a title to a trade mark (even against a wrong doer) when some one else has a right to use it also. I held otherwise in the case of *Dent v. Turpin* (a). Every case, indeed, must rest on its own circumstances; but the general principle is, that one person shall not be allowed to proclaim his goods as the goods of another, and if it appear that the mark used does not indicate the Plaintiff more than a multitude of other persons (as in the case where "Prize Medal" was the symbol (b),) there a Defendant who uses it does not bring himself within the prohibition. At the same time I was strongly of opinion in *Dent's case*, that although the firm was subdivided and both houses used the old name on account of its celebrity, either of them could maintain a suit alone to restrain third persons from appropriating the name; and I overruled the demurrers on that ground. Ultimately, however, the parties combined, and I granted an injunction at the instance of both, considering that it was a valuable privilege to both of them to have the benefit of the reputation which the old name had acquired.

This is not nearly so strong a case. The difficulty suggested is not that any other firm in *England* has used this mark from 1857 to 1861, but that *Giandonati* was a partner in the old firm (as I consider that he was in *America*) and *might have* used the name of *Crockett*. The answer is, that he *did not* use it, but on the contrary allowed the Plaintiffs for four years to have the exclusive use in *England* of a mark bearing the name of *Crockett*. After this it is clear that the name would never lead any one to think of *Giandonati*. Goods bearing that mark could only mean goods of the Plaintiffs.

(a) 2 J. & H. 139.

(b) *Batty v. Hill*, ante, p. 264.

Then again, it is said, that the use of the Defendants' trade mark is not an interference with the Plaintiffs' right. The *American* Company covenanted that they would not use the old trade mark in *Europe* (a stipulation which, whether too large to be sustained or not, has in effect been faithfully observed). At the same time, they reserved to themselves the right to use the old name in their *American* business, and accordingly have continued to put *Crockett & Co.* on their goods. The only fact which the Defendants have to rely on is that a foreign firm, having the right to use in their own country the name which the Plaintiffs alone have used in *England*, have exported goods bearing this mark to any customers in *England* who wished to deal with them. The *American* firm has had no depot in *England*, and the Plaintiffs admit that they have no reason for complaint on this ground. No importer, therefore, could be deceived as to the origin of the goods; and the only possible uncertainty which could arise would be in the case of retail traders. There being only these two firms in the world who are entitled to the trade mark, and these firms carrying on business the one in *America* and the other in *England*, the difficulty is much less than it was in *Dent v. Turpin*; and I cannot hold that the Plaintiffs are on this account disentitled to the assistance of the Court.

So far as the title of the Defendants' Company is concerned, I allow that as manufacturers of leather cloth they could scarcely avoid some resemblance to the name of the Plaintiffs' Company, and that they have, perhaps, done all they could to distinguish the Companies by adopting the prefix "*American*." But it was not at all necessary to select an eagle as a symbol; and the fact of their having done so with some variation in the attitude of the bird is a little suspicious. The same may be said of the use of the word "*superior*," in the same way in which the Plaintiff

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use the word "excelsior." These matters would probably not be enough to warrant the interference of this Court; but having gone so very near to the prohibited line, it was the duty of the Defendants to be especially careful not to overstep it by appropriating the name of *Crockett*, which was evidently the most valuable part of the Plaintiffs' trade mark. It is true that they have the words "late with *Crockett & Co.*," but the arrangement and type are such as to make the important words strike the eye in much the same way as they do in the Plaintiffs' mark.

It is not necessary to go beyond the Defendants' evidence for proof that the name is the most valuable part of the mark. They say that leather cloth is generally known as *Crockett's*; and they insist that they have a right to proclaim the fact that their manager was formerly with *J. R. & C. P. Crockett & Co.* If the fact were so, no doubt they would be entitled to make it known to their customers, but not to do so by an imitation of the original trade mark. But I do not think that what they have done was done *bonâ fide* for this purpose. They bought an old business, which was not thriving. Then they engage two persons who had been employed at *West Ham*, one of whom was never under Mr. *Crockett*, but only in the service of the *International Company*; the other was in a sense employed by *Crocketts*, but it was *Dodge* who paid his wages; and it is rather a stretch of language to describe him as in *Crocketts'* service; and it is singular that one of these gentlemen says that he does not know at which of them the statement on the Defendants' trade mark was supposed to point. That is enough to show the character of the proceeding. I take it to be clear, therefore, that the Defendants have invaded the Plaintiffs' rights.

There remains one point, which has given me much

anxiety upon the evidence which is now before me. No one can feel more strongly than I do the necessity of insisting on perfect good faith on the part of a Plaintiff coming for relief. In the case about the *Kitcheners* (a), I considered myself bound to refuse an injunction to a Plaintiff who had put the word patent on his trade mark, when in fact no patent had ever been obtained. This was followed by *Edelsten v. Vick* (b), where a person who held a patent had stamped the word upon his goods, and had continued the use of the same mark after the patent had expired; and under these circumstances it appeared to me that I could not treat it as a fraud on the public disentitling him to relief. The word had been put on the mark bonâ fide, and the consequence of an alteration after the mark had become established might have been very injurious. Moreover, every one must be taken to be aware of the possibility of a patent having expired.

Here the Plaintiffs, adopting the practice of their predecessors the *International Company*, stamp on their goods the words "Tanned Leather Cloth, patented January 24, 1856." The process referred to may, it seems, be one of dyeing or tanning either one side or the other or both of the cloth. Perhaps it would have been better to use those words only on the "tanned" cloth; but it appeared to me on a former occasion quite impossible for any one to be misled into buying the untanned for the tanned article. It was suggested (though only at the bar) that a purchaser might suppose the cloth to be tanned on the side covered by the enamel. But the object of the process being to give the appearance of leather, this suggestion seems idle. If "Patent Gilt Leather Cloth" were written on every piece, no one would buy ordinary cloth in the belief that it was gilt, and what is called tanning is exactly an analogous

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(a) *Flavel v. Harrison*, ubi sup.(b) *Ubi sup.*

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process of colouring. I considered, therefore, when this case was before me on a former occasion (a), that every one must refer the words to the tanned cloth only, which is a patented article, and that there was no deception practised on the public.

The case is somewhat altered on the present occasion by the evidence which has been given for the purpose of shewing that people have been misled in the way which I had supposed impossible. One witness indeed carries the case so high as to say that *Dodge* originally took out the tanning patent solely as an excuse for putting the word patent on the goods, and that the patent itself was known to be worthless. But statements as to the supposed intention of a third person are clearly inadmissible. And that the patent has a substantial value is proved by the fact which is in evidence, that the *London and Brighton Railway Company* insist on having the tanned cloth, although a slightly higher price is charged for it. It is true, that (in consequence it may well be of the difference in price) nine-tenths of the business is in untanned cloth; but this is no evidence that the patent is worthless, still less that it was such a device as has been suggested. Now, what I find on the mark is not "patent" simply, but "tanned patented," and I cannot think that this can fairly be said to be calculated to mislead any one. No doubt people will give an additional price for patented articles; but still the public must be supposed to exercise ordinary judgment, and cannot complain of being misled when there is nothing that need mislead them.

I am of opinion, therefore, that although it would have been far better for the Plaintiffs not to have put the words "tanned patented" on any untanned cloth, still the statement sufficiently explains itself, and is not a ground for refusing relief.

As to the Defendants' evidence that no one who was in

(a) *Leather Cloth Company v. Hirschfeld*, ubi sup.

the habit of buying both the Plaintiffs' and the Defendants' manufacture was ever deceived by the resemblance of the trade marks, it amounts to nothing; and I have, on the other side, the distinct evidence of one witness that he asked for *Crockett's* Leather Cloth, and was offered the Defendants' article. It is true, it was not represented to be the Plaintiffs' cloth; but this transaction alone is enough to show that the use of the Defendants' trade mark did lead to deception. Under these circumstances, I think the Plaintiffs are entitled to a decree for an injunction with costs.

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THE LEATHER CLOTH COMPANY (LIMITED) v.
HIRSCHFELD.

THE facts of this case were precisely similar to those of *The Leather Cloth Company v. The American Leather Cloth Company (a)*.

July 16th.
Practice—
Account—
Cross-Examination of Defendant.
Where a decree has been made directing the Defendant to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped.

In the course of the year 1859 *Dodge* and *Giandonati* had set up in business as manufacturers of leather cloth at *Old Kent Road*, and they then sold cloth stamped in a manner which the Plaintiffs considered an infringement of their rights, and they accordingly filed a bill to restrain such infringement.

Dodge and *Giandonati* submitted to an injunction in that suit, which was not further proceeded with, and they soon afterwards became bankrupts.

Giandonati then entered into partnership with the Defendant *Hirschfeld Peraire* under the style of "*The Anglo-American Leather Cloth Company*," and they stamped their leather cloth with a mark very similar to the trade mark of the Plaintiffs (*b*).

(a) Ante, p. 271.

(b) See page 272.

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Statement.

The present suit was filed to restrain this practice; and by the decree made therein on the 11th March, 1863 (a), the Defendants were restrained from using the said trade mark, and an inquiry was directed as to damages.

In the prosecution of this inquiry *Peraire* filed an affidavit, in which he deposed that these marks were only impressed on the best quality of cloth, and that from his knowledge and recollection of such goods such marks were not impressed on more than 600 or 800 pieces, but no account of such pieces was kept.

Giandonati, in his affidavit, stated that he supposed about 1,000 pieces had been stamped; and a third witness said he thought from 500 to 700 pieces.

Under these circumstances *Peraire* was cross-examined before the examiner. In the course of his cross-examination he admitted that he had customers in various places, and that he knew the names of some of them; but he declined to give the names.

The question objected to and the previous answer (on which it was founded) were as follows:—

A. We have had customers in *Spain*. I know the names of some of them, not of all.

Q. Give the names of those you do know.

Question objected to as irrelevant.

Argument.

Sir *Hugh Cairns*, Q.C., and Mr. *Dickinson*, now moved that *Peraire* should be ordered to attend before the examiner and answer the question, and to pay the costs of the motion.

Mr. *W. N. Lawson*, contra, contended that the question was not relevant to the inquiry, and was a mere fishing

(a) Reported 1 N. R. 551.

question for the purpose of getting at the details of the Defendants' business. He referred to *Drake v. Symes* (a).

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Sir *Hugh Cairns* in reply :—

Their affidavits are altogether contradictory, and we have no means of getting at the truth except by tracing the cloth to the customers.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The right course seems to me to be to confine the question in the first place to the names of customers to whom stamped cloth has been sold.

Judgment.

The way to test it seems to be, to treat this as if it were an exception to an answer. Suppose that in answer to the interrogatories one Defendant had said he believed there were 500 pieces, and another had said he thought 1,000 pieces, both agreeing that no account had been kept, then you might fairly amend your Bill, and, declining to trust to so faulty a memory, you might ask him by the further interrogatories to whom he had sold any of the stamped cloth ; and if he gave you all the names of those persons, and would undertake to swear that there were no others, I do not think that you would have any right to ask about customers who had only had unstamped cloth ; but if he professed himself unable to distinguish between the purchasers of stamped and those of unstamped cloth, in that case, but only in that case, I think you would be entitled to ask for the names of all his customers, to enable you to investigate that matter for yourselves.

With this intimation of my opinion the case had better be remitted to the Examiner. Costs to be costs in the cause.

(a) Joh. 647.

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July 4th, 5th.

*Metropolitan
Local Manage-
ment Act—
Drainage—
Nuisance.*

The right of prosecution given to the Home Secretary by the Act 21 & 22 Vict. c. 104, s. 81, does not supersede the right of private persons aggrieved by the nuisance to an injunction.

Distinction between parliamentary powers to do acts which necessarily involve the commission of nuisances, and powers which may possibly be exercised without giving rise to nuisances.

ATTORNEY-GENERAL AT THE RELATION OF THE TRUSTEES OF THE RIVER LEE v. THE METROPOLITAN BOARD OF WORKS.

THIS was a motion for an injunction to restrain the Defendants "from causing or permitting any sewage to pass or flow down through or from the sewers known as the High Level Sewer and Middle Level Sewer, or either of them, into the River *Lee*."

The Trustees of the River *Lee* are a corporate body having the control of the navigation of the said river from the town of *Hertford* to its outfall into the *Thames*, under powers vested in them by the following Acts of Parliament, 13 Eliz. c. 18; 12 Geo. 2, c. 32; 7 Geo. 3, c. 51; 13 & 14 Vict. c. cix.; and in pursuance of such powers they have constructed the works known as "*The Limehouse Cut*" and "*Limehouse Basin*," and it was stated by the information that there was a considerable and increasing traffic in the river, now exceeding 350,000 tons per annum. The Defendants, acting under the provisions of the Acts 18 & 19 Vict. c. 120 (a), and 21 & 22 Vict. c. 104 (b), have laid out and in part constructed the two "intercepting sewers" known as the High Level Sewer and the Middle Level Sewer.

The length of the High Level Sewer is about eight miles, and it commences in the parish of *Hampstead* and terminates at "the Sluice House," about 450 yards from the right bank of the River *Lee* at *Old Ford Locks*.

The length of the Middle Level Sewer, when completed, will be about 12½ miles, and it is to commence at the *Counter Creek Sewer* near *Kensall Green*, and to termi-

(a) Sect. 135.

(b) Sects. 1, 24, 32.

nate at the said Sluice House. About three miles from the Sluice House have been finished.

It is intended that a large sewer, to be called "The Northern Outfall Sewer," shall be made from the said Sluice House to the *Thames* at *Barking Creek*, the place fixed by the Act for the outfall of the sewage. This sewer is to cross the River *Lee* in two culverts (a).

It appeared from the affidavits on the part of the Defendants that this Outfall Sewer ought to have been completed by the beginning of the month of February, 1863; but that this had been prevented by the failure of the sub-contractor who was to have provided the ironwork; and there was considerable conflict of testimony as to the time when this sewer would be completed, the relators saying it would require at least twelve months, the engineer of the Defendants saying "in about thirteen weeks."

As the construction of the intercepting sewers progressed, some of the main sewers crossed by them were diverted into them, and thus sewage, which would otherwise have been carried down through such main sewers, was caught by the intercepting sewers and carried down to the Sluice House, and such sewage would, as soon as the Outfall Sewer was completed, be carried out by that sewer and discharged into the *Thames* at *Barking Creek*.

The principal main sewers which are thus intercepted by the High Level Sewer had previously, through the *Hackney Brook*, flowed into the River *Lee*; and it was admitted, that, so soon as all the works were completed, that river, so far from being in anyway injured by the works, would be greatly benefited, because the sewage of all these old sewers,

(a) Since this motion was heard the sewage being carried down this sewer has been so far completed as to admit of a portion of it to the reservoirs at *Barking Creek*.

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and particularly that of the *Hackney Brook*, would be carried off by the Outfall Sewer.

None of the sewers intercepted by the Middle Level Sewer had ever, previously to the acts complained of, reached the River *Lee*.

It appeared, that whilst the High Level Sewer was in progress, two large underground sewers were made by the Defendants from the Sluice House into the River *Lee*, entering that river through the piers of the intended bridge which is to carry the said culverts over the river.

Over the openings in the piers are cut the letters and figures "M. B. W. Storm-water Outlets, 1859;" but it was stated, and not denied, that these outlets were not completed till 1860, and that the relators did not know, till the month of July, 1861, that the inscriptions in question had been placed over the openings.

The permanent object of these storm-water outlets appeared to be to provide means of escape for the extra water which in times of storm or heavy rains would be brought into the intercepting sewers, and which the Outfall Sewer would be insufficient to carry off; and they were accordingly intended to be so fenced off from the sewers that no water whatever would find its way into them until the Outfall Sewer was full or nearly so. In the mean time, however, and until the completion of the Outfall Sewer, all the sewage which came down the intercepting sewers was discharged through the storm-water outlets into the River *Lee*.

On the 30th August, 1860, the following letter was sent by the Clerk to the River *Lee* Trustees, to the Clerk of the Board of Works:—

" *Hertford*, 30th August, 1860.

" Sir,—I am directed by the trustees of the River *Lee* to inform you that their attention has been directed to the

sewage works intended to cross the navigation at *Old Ford* and now in course of erection ; and having viewed the spot, they are apprehensive that such works will very materially interfere with their river, and cause a serious nuisance, as well as be dangerous to the barges passing along the navigation. They are supported in this opinion by their engineer, Mr. *Beardmore* ; and I am, therefore, directed to request, that before proceeding further with the proposed works adjacent to or affecting the navigation the Board will submit the working plans for inspection and approval by the trustees. I am further directed to say, that the trustees will readily co-operate with the Metropolitan Board in any works that may be necessary for the great public improvement of effectual drainage of the Metropolis, provided they can do so consistently with their duty as conservators of the River *Lee* navigation. Waiting your early reply,—
I am, Sir, your obedient Servant,

“ *J. Pollard, Esq.,*

“ *J. MARCHANT.*

“ Clerk of the Metropolitan Board of Works,

“ *Greek Street, Soho.*”

That letter produced the following reply :—

“ Metropolitan Board of Works,

“ Engineer’s Department, 1, *Greek Street, Soho,*

“ 5th October, 1860.

“ Sir,—Your letter dated 30th August last with reference to the execution of the Main Drainage Works at and over the River *Lee* has been submitted to this Board, and I am directed to transmit to you for the information of the Trustees a copy of the designs for the proposed bridge and other works in connection therewith, and to state, that if in carrying out the work any suggestions can be made by the engineer of the Trustees which will in any way accommodate or improve their property without materially interfering with the proposed works, this Board will be happy

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to give the same due attention.—I am, Sir, your obedient
 Servant,

“ J. Marchant, Esq.,
 “ Hertford.”

“ J. W. BAZALGETTE,
 “ Engineer.

Designs for the proposed bridge over the River *Lee* at *Old Ford*, and other works in connection therewith, accompanied this letter ; but it was admitted that these designs did not show the two under-ground storm-water outlets, nor did they furnish any indication of the intention to make any such outlets into the River *Lee*.

In consequence of these communications meetings took place between deputations appointed by the parties respectively, at which the best mode of constructing the works proposed by the Defendants was discussed ; and the relators stated that they were then assured by Mr. *Thwaites* the chairman of the Board, and by Mr. *Bazalgette* their engineer, that the storm-water, which would be discharged through the storm-water outlets, would be pure rain-water drainage, which would be directed through those channels when after an excessive fall of rain it might be desirable to relieve the main sewers ; and they said that, relying on these representations, and being desirous to facilitate as far as they could the important public works in course of construction by the Defendants, they agreed to allow the Defendants to proceed with their works.

This was denied by Mr. *Thwaites* and Mr. *Bazalgette* ; who stated that all that they had said was, that the object and design of the storm-water outlets was, to relieve the regular Outfall Sewer from storm-waters, and that therefore the water which would pass through such outlets when the works were complete would be pure in comparison with ordinary sewage ; and Mr. *Bazalgette* expressly swore that all his remarks “ had reference to the action of the storm

outlets when the sewage works should be perfected, and in working action on their completion."

In the course of the year 1862 it was discovered that the effect of the sewage which passed through the storm-water outlets into the River *Lee* was so great as to cause a shoaling of the river, and a consequent interference with the navigation.

Thereupon the River *Lee* Trustees caused the following letter to be written and sent to Mr. *Pollard*:—

" *Hertford.*

" 15th November, 1862.

" Dear Sir,—It having been reported to the Trustees of the River *Lee* at their meeting this day by Mr. *Beardmore*, their engineer, that sewage matter under the control of the Metropolitan Board of Works now flows through the storm outfall sewer into the River *Lee* at *Old Ford* to such an extent as to cause most serious mischief, and likely very shortly to destroy the navigation altogether, I am directed to inform you for the information of your Board that the continuance thereof cannot be permitted; and I am further to request that you will bring the subject before your Board, and to ask that Mr. *Bazalgette* may be instructed without loss of time to meet Mr. *Beardmore*, with a view to some immediate steps being taken to remedy the evil complained of. The favour of an early reply will oblige,—
Yours faithfully,

" J. MARCHANT,

" Clerk to the Trustees."

Various communications took place in consequence of this letter; but it did not appear that the Board in any manner admitted in any of these communications that they were in any way liable in respect of any of the things complained of, though they professed themselves ready and

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willing to obviate the mischief so far as they could. It appeared that they had placed gratings over the entrances to the storm-water outlets to prevent the passage of bricks and such matters through the outlets; but these were wide gratings, with bars two feet asunder, and therefore not adapted to prevent any part of the sewage from falling into the river.

On the 13th January, 1863, Mr. *Beardmore*, the engineer of the River *Lee* Trustees, wrote the following letter to Mr. *Bazalgette* :—

“ River *Lee* Trust and the Metropolitan Board of Works,
 “ 30, Great George Street, Westminster,
 “ 13th January, 1863.

“ Dear Sir,—In reference to our discussion on Friday last as to the evil effects accruing to the River *Lee* from the enormous quantities of mud poured into it and the consequent formation of mud banks, and to your suggestion that I should make a proposition on the subject, I beg leave to say that the only effective way of mitigating the evil is to get a steam dredging machine to work immediately, capable of taking up (say within fourteen days of accepting this offer) at least 1000 tons per week of the mud below the mouth of our outlets, and keeping such dredges constantly at work while the mud accumulates. If the engine cuts somewhat deeper than our old bottom, which is 10 feet below Trinity high-water for 300 or 400 yards below the sewers, some portion of the heavier matter of the sewage may probably deposit there, and thus limit the continual encroachments of those banks down the river. Last week we had two barges aground for 24 and 50 hours, although the water was nearly one foot above head, indicating a corresponding increase in the depth of mud within the last month.

" Under these circumstances, we are willing to suspend the operation of our steam dredger on important works on which it is employed until another can be procured ; and we are willing to do our best to obviate the necessity of recurring to the protection of the law, which it will be my duty to recommend my Board if we do not agree.

" Under the present immediate necessity for action, I will defer entering upon other matters connected with your works, simply requesting an answer to this proposal, which I may lay before the Trustees on Saturday next.

" Of course, the foregoing proposition implies, that on your part you undertake to discharge every expense which may be incurred in the superintending and execution of the works, and that all other costs and expenses incurred by the Trustees in relation to this question be paid by your Board.
Yours faithfully, "NATHL. BEARDMORE.

" J. W. Bazalgette, Esq.,
" Engineer to the Metropolitan Board of Works."

This letter was shortly afterwards replied to by a letter from Mr. *Thwaites* to Mr. *Marchant*, which was as follows :—

" Metropolitan Board of Works,
" *Spring Gardens, S.W.*, 16th January, 1863.

" Dear Sir,—The Board have to-day authorised me to take steps, in conjunction with the engineer, for remedying the complaint of the Trustees of the *River Lee* navigation. Mr. *Bazalgette* informs me that he is prepared to propose a mode for removing the deposit in a short time, and at small cost. Probably the Trustees will empower their engineer to co-operate with us, and afford every facility in his power for giving effect to Mr. *Bazalgette's* proposals.—Yours obediently,

" J. THWAITES.

" *John Marchant, Esq.*"

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At the same time a similar letter was written to Mr. *Beardmore* by Mr. *Bazalgette*.

On the 19th January, Mr. *Thwaites* wrote the following letter to Lord *Salisbury*, who is the Chairman of the River *Lee* Trustees :—

“ Metropolitan Board of Works,

“ *Spring Gardens, S.W.*, 19th January, 1863.

“ My Lord,—Permit me to explain that my letter to Mr. *Marchant* of the 16th inst., and Mr. *Bazalgette's* of the same date, refer to the same proposition, both being based upon discussions which have recently taken place between Messrs. *Beardmore* and *Bazalgette*, resulting in a proposal that the Board should hire the steam dredging machine of the Trustees for a sufficient period to enable them to remove the deposit discharged into the River *Lee* by the *Hackney Brook* Sewer at £30 per week, including coals, oil, and drivers. If your Lordship, on behalf of the Trustees, is willing to ratify Mr. *Beardmore's* suggested arrangement, I will direct our engineer immediately to take the necessary steps for its execution.—I have the honour to be, my Lord, your obedient servant,

“ J. THWAITES,

“ Chairman of the Metropolitan Board of Works.

“ The Most Hon. The Marquis of *Salisbury*, K.G.,

“ &c. &c. &c.”

This was replied to by the following letter :—

“ *Hertford*, 22nd January, 1863.

“ Dear Sir,—I am directed by the Marquis of *Salisbury* to acknowledge the receipt of your letter of the 19th inst., and to inform you that Mr. *Beardmore* has directions immediately to place the steam dredging machine of the

Trustees at the disposal of the Board of Works, for the purpose of removing the deposit discharged into the River Lee by the *Hackney Brook* Sewer, it being clearly understood that the payment by the Board (£30 per week) is for the hire of the dredging machine, and is to include coals, oil, and drivers of the engines only. I have the honour to remain, Sir, your obedient servant,

"J. MARCHANT,

"J. Thwaites, Esq."

"Clerk.

The dredging-machine of the Trustees was accordingly placed at the disposal of the Defendants, who used it for some time and then returned it, stating that as much had been done as was necessary; and it was admitted by the relators that the river had thereby been greatly improved.

In the month of February some verbal communications took place between the engineers on both sides, the effect of which was somewhat disputed; the Trustees averring that they had been then assured that no more drains should be connected with the Middle Level Sewer till the Outfall Sewer had been completed, and the Defendants alleging that no such representation had ever been made, but that the Board had promised not to open "new sewers" into the Middle Level Sewer till that time.

On the 31st of March, 1863, the *Hoxton Brook* Sewer, which had hitherto fallen into the *Thames* at or near *London Bridge*, was intercepted by and turned into the Middle Level Sewer, and a greatly increased quantity of sewage (which was stated to have exceeded on the 30th of April, 1863, the amount of 47,000,000 gallons) was thereby turned into the River Lee. The Trustees complained of this as a breach of faith; and contended that this was quite unnecessary, as the Middle Level Sewer might have been completed without connecting any drains with it till the Outfall

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Sewer was ready; but the Defendants denied the breach of faith, and stated that the works could not have been made differently, because the *Hoxton* Sewer passed directly through the barrel of the Middle Level Sewer, which could not have been completed till such connection had been made.

At a meeting of the Trustees held on the 16th of April, 1863, Mr. *Beardmore* reported to them that the Defendants had discontinued the use of the dredging-machine, and that they had moreover caused a considerable quantity of additional sewage matter to flow into the River *Lee* from sewers newly connected with the Middle Level Sewer. Thereupon the following letter was sent to Mr. *Pollard*:—

“*Hertford*, 16th April, 1863.

“Sir,—The Trustees of the River *Lee* regret very much to learn from their engineer not only that the Board of Works have discontinued dredging, but that they have caused much additional sewage matter to flow into the *Lee* navigation from fresh-drained districts by means of the Middle Level Sewer. I am directed to inform you that the Trustees consider it their duty not only to protest against the present course of proceedings by the Board, but to take steps to prevent an unauthorised use of the river, the navigation of which is not only daily damaged, but may, by a continuance of the drainage as now carried on, be entirely destroyed; and they request that the Board will, without delay, take such measures as may be possible to prevent further damage to the navigation.—I remain, Sir, your obedient servant,

“J. MARCHANT,

“Clerk to the Trustees.”

“*J. Pollard*, Esq.,

“Clerk to the Metropolitan Board of Works,

“*Spring Gardens*, S.W.”

No answer to this letter having been received, the following letter was written and sent :—

“ Hertford, 30th April, 1863.

“ Dear Sir,—I am directed by the Marquis of *Salisbury* to request that you will be so good as to call the attention of the Metropolitan Board of Works, at their meeting to-morrow, to my letter of the 16th inst., and to ask for some immediate reply thereto.—I remain, Dear Sir, yours faithfully,

J. MARCHANT.

“ J. Pollard, Esq., Metropolitan Board of Works.”

This produced the following reply :—

“ Metropolitan Board of Works.

“ Spring Gardens, S.W., 2nd May, 1863.

“ Dear Sir,—At the meeting of the Metropolitan Board of Works held yesterday, they had under their consideration your letter of the 16th April last, alleging that the Board had discontinued the dredging of the River *Lee*, and that additional sewage had been caused to flow from newly drained districts into the navigation ; and in reply thereto I am directed to state, with regard to the first point, that with the view of having the work properly and effectually executed, the Board employed one of the Trustees’ own foremen, who had reported to them that more dredging had been done than was actually required ; and that, from inquiries made since the receipt of your letter, the Board have every reason to believe that this statement is a truthful one ; that, with reference to the alleged flow of additional sewage into the river, the Board desire me to assure you that great care is taken to prevent, as far as practicable, the flow of sewage, and that they are pressing on the main drainage works to completion as rapidly as possible, and entertain a strong conviction that they will soon be in a position to divert the sewage from the River *Lee*, when the Trustees of the navigation will participate in the general

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benefits which will be derived from the main drainage works.—I am, Dear Sir, yours truly,

“JOHN POLLARD, Clerk of the Board.

“*J. Marchant, Esq., Hertford.*”

The Trustees replied as follows:—

“*Hertford*, 6th May, 1863.

“Metropolitan Board of Works *and* Trustees of the River *Lee*.

“Dear Sir,—I beg to acknowledge the receipt of your favour of the 2nd inst., which, although dated on Saturday last, did not reach me till yesterday per post. I felt it necessary to apply without delay to the Marquis of *Salisbury*, the Chairman of the Trust: and I am directed by his Lordship to express his regret that your letter should be so unsatisfactory, and, above all, that the Metropolitan Board should put forward a claim of right to turn any sewage whatever into the River *Lee*. Not being able to find any ground for the assertion of so mischievous a right, he trusts that the Board will at once acknowledge that it has been inserted by inadvertence in their letter, and that they will prove the sincerity of that admission by forthwith diverting the flow of sewage into its proper channel. The Trustees have already been called upon, as conservators of the river, to interfere, by some of the inhabitants of the district, to put a stop to this intolerable nuisance. The Metropolitan Board have delayed to take any measure to put an end to it, although called upon three weeks ago to do so by the Trustees, and if any fever or illness should break out, the Board will have incurred a heavy responsibility. Lord *Salisbury* enters his protest, in the name of the Trustees, against the right claimed by the Metropolitan Board to turn sewage into the river, and feels it to be his duty to call a special meeting of the Trustees to consider, under legal advice, the best mode of putting a stop to further mischief,

and to obtain reparation for the damage already done to the navigation, but repeats the request that he has made, that the Metropolitan Board will, by immediate action, render any legal proceedings unnecessary.—I remain, Dear Sir, yours faithfully,

J. MARCHANT,

“Clerk to the Trustees.

“*J. Pollard, Esq., Metropolitan Board of Works.*”

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To which the Board replied as follows:—

“Metropolitan Board of Works,
“Solicitor’s Department, *Spring Gardens, S.W.*,
“May 9th, 1863.

River *Lee* Trust.

“Sir,—Your letter was yesterday laid before the Board. I need hardly assure you that the Board would most earnestly desire to avoid any offence to the Marquis of *Salisbury* or to the Trustees, and the Board looks forward to the completion of their works, so that all possible complaint may be removed. The Board has again conferred with their engineer, and find that it is really an impossibility to prevent the accustomed discharge at present. The rapidly progressing works will, it is hoped, effect all that can be desired.—I am, Sir, your very obedient servant,

“*J. Marchant, Esq., Hertford.*” W. W. SMITH.”

Upon this the information was filed.

A great number of affidavits was filed on both sides, those of the relators asserting and those of the Defendants denying that a great increase of the impurity of the river had resulted from the operation of the storm-water outlets. The relators produced several persons to depose to the increase of disease in the neighbourhood since the sewage had been turned into the river; and the Defendants produced the evidence of resident physicians and surgeons, who stated

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that such increase (if any there were) was attributable to totally different causes.

The Defendants also filed affidavits, to show that the work could not be done more expeditiously nor so as to be less offensive in any other manner; and that any interference with them now would lead to the stoppage of the sewers at their mouths, which would be fraught with the greatest danger to life and property in the district.

Argument.
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Mr. *Giffard*, Q.C., and Mr. *J. Pearson*, for the motion :—

In carrying out the works ordered by Parliamentary authority, they have no right to commit a nuisance against individuals; and the argument *ab inconvenienti* will not be listened to against a private right: *Att.-Gen v. Council of Borough of Birmingham* (a).

Then they will argue that a mandatory injunction is never granted upon an interlocutory application; but that rule is not universal: *Lane v. Newdigate* (b).

[The VICE-CHANCELLOR referred to *Robinson v. Lord Byron* (c)].

Mr. *Pearson*.—They can easily restore the *Hoxton Sewer* to its old course, and that would to a great extent relieve us.

We could not come here till we could show that injury had been in fact sustained: *Manchester, Sheffield, and Lincolnshire Railway Company v. Worksop Board of Health* (d).

Mr. *Rolt*, Q.C., Sir *Hugh Cairns*, Q.C., and Mr. *Charles Hall*, contra :—

The meaning of the Act is this: So soon as your works are completed they are to be maintained and kept so as

(a) 4 K. & J. 528.

(b) 10 Ves. 192.

(c) 1 Bro. C. C. 588.

(d) 23 Beav. 198.

not to be a nuisance; but whilst your works are in operation, you may do all things necessary for your purposes, subject to the control of the Home Secretary (a).

If this be a nuisance, their only remedy is by a prosecution under the direction of the Home Secretary, in accordance with the 21st section of the Amendment Act (b).

Besides, the Plaintiffs are merely conservators of navigation, and no nuisance affecting the navigation of the river has been alleged or proved.

This Court will not interfere with the fair exercise of their discretion by a public body, who have been intrusted with such duties by Act of Parliament: *Biddulph v. Vestry of St. George's Hanover Square* (c).

[The VICE-CHANCELLOR.—That case is like the case against the Conservators of the River *Thames* (d), where I held, that, as a pier in the river must necessarily be a nuisance to some one, and as Parliament had authorised such a pier, no private individual could complain that he was the party selected].

Mr. Rolt.—Then, on the balance of convenience, there can be no question that the Court ought not to interfere. Ours is a good permanent plan, and will be completed in less than three months; their's a bad temporary one, which will take at least two months to execute. The Court will not interfere to prevent a mere temporary nuisance: *Att.-Gen. v. Sheffield Gas Consumers' Co.* (e).

The case of *North London Railway Co. v. Metropolitan Board of Works* (f), shows how great a discretion is vested in us.

(a) 18 & 19 Vict. c. 120, s. 135.

(b) 21 & 22 Vict. c. 104.

(c) 2 N. R. 212; 11 W. R. 739.

(d) Ante, p. 1.

(e) 3 D. M. & G. 304.

(f) Joh. 405.

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The Bill is filed too late.

[The VICE-CHANCELLOR.—They communicated with you at once.]

Mr. *Hall*.—We never held out any hope that we would alter our plans.

This is a very serious and arguable question ; and therefore no relief will be given by mandatory injunction before the Hearing, whatever might be done in a case where the work required was very small.

We are willing to undertake to do all we reasonably can in the interim.

[The VICE-CHANCELLOR.—Mr. *Giffard*, if this matter were not done, and I had now to restrain it from being done, I think the law would be with you, and that I ought not to allow such a thing to be done pending the suit. But the difficulty I now have is this: you are now offered an undertaking not to do anything more than will have the effect of increasing the pollution of the river, and also an undertaking so to dredge as to prevent any further injury to the navigation. Then I have to deal with three considerations :—

1. Can I, in a case of this magnitude, act by interlocutory injunction ?

2. Taking the evidence of your own witnesses, is it clear that any fresh damage has been done since the 31st of March ? (I take it as clear, that I could not, at this stage of the cause, interfere in respect of anything prior to that time). And

3. Am I justified in compelling any works of this kind to be commenced now, just before the beginning of July,

which is, as I understand, the very month in which storms may most reasonably be expected.]

Mr. *Giffard*, in reply :—

The mere fact that we are applying for a mandatory injunction does not per se constitute a ground for refusing the motion. It is a mere question of degree.

The Board have not acted bona fide towards us: had they told us what they were about to do, we would have come in time to prevent them.

They never dreamt of fixing a time for the completion of their works till they were pressed by our evidence.

Any engineer could do the work necessary for our relief in ten days.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

It is very much to be regretted that the Metropolitan Board should have acted in the manner in which they have in this instance conducted themselves. They are gentlemen interested in these works as a public body, and all consideration should be paid to the circumstance that they have no personal pecuniary advantage to obtain; and I should on that account be disposed to assume that whatever they do or have done is in every case that which in their judgment is most for the public benefit. But then there is, in public bodies of this nature, a disposition to act in an arbitrary manner, and to treat it as an impertinence on the part of others to interfere with their proceedings; and therefore it frequently happens, that they do not adopt that reasonable course of conciliation, and free and frank communica-

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tion of their plans which this Court always looks for, and generally finds on the part of private individuals.

These gentlemen must have been advised that it was at least doubtful whether they could now, for the first time, turn the whole sewage of the district into the River *Lee* without leave of the conservators of that river; and yet they clandestinely, and without any communication whatever with the conservators, proceed in the course of their own works to do an act which they knew would have this effect.

I do not think that any objection can be taken to the original construction of these "storm-water outlets." It appears that they were originally intended to meet extraordinary cases of emergency, and to carry off large and sudden floods, but not for the conveyance of ordinary sewage. In 1861, when they were first observed by the conservators, and inquiries were made about their purpose and object, Mr. *Bazalgette*, on behalf of the Board, made a representation, the effect of which has been somewhat controverted, but which I take to have been something of this nature:—"These are merely storm-water outlets; storm-water is not objectionable, and though I do not guarantee that such storm-water will be perfectly free from sewage matter (of course it will contain some such matter), it is evident that it will be in so greatly diluted a state as to be comparatively innocuous, and there will be nothing for reasonable men to complain of."

The River *Lee* Trustees appear to have been, very properly, satisfied with this explanation, and the matter then dropped. But the next thing done by the Board was to connect the High Level Sewer with these storm outlets, and thereby to turn a great portion of the sewage of the High Level District into the River *Lee*.

The conservators could not, perhaps, complain much of that, because the *Hackney Brook* had always run into their river; and they admit that the effect of connecting the High Level Sewer (which intercepts the *Hackney Brook*) with the storm outlets was to alter the state of the river but little, if at all.

It was, however, found by experience, that the alterations were productive of shoals in the river; and the Board appear so far to have admitted that they were the authors of the evil, that they promised to dredge the river, and did so for some time.

Still it does not appear, that up to this time anything had been done of which the Trustees of the river would have thought it necessary to complain; but the next thing done by the Board is that they connect with the Middle Level Sewer, which also communicates with these storm-water outlets, the *Hoxton Brook*, a main sewer which drains an entirely new district with which the River *Lee* had previously had no connection, and thus turn the whole of the sewage of this district into the river.

Now this was done, notwithstanding that the Board had clear knowledge that the Trustees strongly objected to the introduction of extra sewage into the river; notwithstanding that they had, (I must assume,) doubts as to the legality of their act; and was done without any previous communication with the Trustees, and in the face of the promise spoken to by Mr. *Beardmore*, that they would not open any new sewers into the river. It is true, they say that in making that promise they were only speaking of their own sewers, and not of any existing main sewers which they might come across in the course of their works. But it obviously must have been a matter of pure indifference to the Trustees whether the drains were new or old;

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indeed, if anything, the old drains would be the greater evil of the two.

I must say, that I do not consider this to be a proper way of carrying on public works; and I must do these gentlemen the justice to state, that I do not think they at first intended to do anything of this kind. If the works had not been delayed by the failure of the iron contractors (for which, of course, the Board are not responsible), the evil, so far as appears, never would have occurred. I cannot take into consideration any difficulties, or supposed difficulties, which the Board may encounter in carrying on their works. It is a mere question of expense; and unless the Board can show that they are acting in accordance with their parliamentary powers, I must consider it a most unjustifiable act so to conduct their works as, for the mere purpose of saving expense to themselves, seriously to injure their neighbour's property.

If the River *Lee* had not existed, they must have taken some means to get rid of this sewage; and those means are equally open to them now. They must not take advantage of their neighbour's property for the purpose, to his detriment.

Mr. *Hall* suggests that they might have diverted the *Hoxton Sewer* into the *Hackney Brook*, and thus turned the whole of the sewage into the River *Lee*.

If this necessarily results from the terms of the Act, of course the Trustees would not be damnified by the fact that the same result has been arrived at in a different way.

The clause relied on is as follows:—

[His Honour read the 135th section of the original Act (a)].

This is a general clause for all time, empowering them

to act from time to time ; but its generality is limited and expounded by the Legislature itself by the final proviso, "And for the purposes aforesaid," (both limited and permanent) "such Board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street, or place laid out as or intended for a street, as well beyond as within the limits of the Metropolis, or through or under any cellar or vault under the carriage-way or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby, as hereinafter provided." And then comes this,—“and the said Board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance, or injurious to health, and to be properly cleared, cleansed, and emptied ; and for the purpose of clearing, cleansing, and emptying the same, they may construct and place, either above or under-ground, such reservoirs, sluices, engines, and other works as may be necessary,” with requisite provisions for the use thereof.

Now this appears to me, so far from conferring on them any such power as that claimed on their behalf, to point directly to a limitation of their powers of dealing with the sewers. And this is the more important, because, unless such an act, if done, would be included within the words of this section, the clause as to compensation would not apply ; the result of which would be that they would be left with power to do the injury, but without any power to pay compensation therefor.

It may be said that the Lands Clauses Consolidation Act might give a remedy to persons injuriously affected ; but I think that the Legislature intended to point out by these particular words how far the Metropolitan Board were to act, and that they did not contemplate a power to turn the entire sewage of the Metropolis into the River *Lee*. It is

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evident that, if they would have been justified in diverting one principal sewer into the *Hackney Brook*, they might have turned another into that one, and so on until the whole Metropolis was ultimately drained into the *Hackney Brook*, and thence into the River *Lee*.

Then it was argued that this was merely a case of nuisance; and that if I were to decide that the Metropolitan Board might not commit a nuisance, the effect would be to put a stop to the works altogether; and I was referred to my own decision in the case of the *Conservators of the Thames* (a); but I do not think that that case determines anything more than this, that any result which necessarily follows from doing an act authorised by the Legislature must be covered by the statute. If that were not so, the authority given by Parliament would be nugatory; but in this case, so far is this injury to the River *Lee* from being a necessary result of the parliamentary powers of the Board, that as a matter of fact it has only happened accidentally and in consequence of the failure of one of the sub-contractors. I cannot, therefore, hold that this is covered by the powers given by the Act.

Nor do I think that the clause in the subsequent Act, which confers certain powers on the Secretary of State (b), helps the Board in the least; it appears to me to have a directly contrary effect.

It may well be that persons, although entitled to prosecute the authors of such a nuisance, may not desire to do so at their own private expense and risk; and therefore the Act directs that, in a case which seems to him to be proper, the Home Secretary may take up the prosecution, and carry it on at the public expense; but he is not to be the person to pronounce whether any alleged nuisance be or not in fact a nuisance: with that question the law is to deal. So

(a) *Ubi sup.*

(b) 21 & 22 Vict. c. 104, s. 31.

far as this clause affects the question it is adverse to the Defendants, because it provides an extra and easier remedy in cases of alleged or supposed nuisance committed by them.

Were I therefore now asked to stop the prosecution of a contemplated act, I should unquestionably have arrested this work till the Hearing of the Cause; but when I consider that they now offer an undertaking to do nothing more, and further to dredge so as, as far as possible, to keep the river free, I have great doubts whether I ought, in the exercise of the discretion vested in the Court, to issue an injunction which would compel the immediate restoration of the *Hoxton Brook Sewer*, or merely to direct the motion to stand over on these undertakings, and with liberty to apply.

[His Honour then discussed at some length the question, whether, as a matter of balance of convenience, the injunction ought to be issued at once; and stated his reasons for coming to a contrary opinion on the facts.]

DEFENDANTS submitting to the injunction to the extent hereinafter mentioned, restrain them from making any further connections of any drain with either the High Level or the Middle Level Sewer until the Hearing or further order. And Defendants undertaking by dredging or other proper means to keep the River Lee free from all obstructions to navigation occasioned by an increased deposit of sewage matter arising from the connection of any sewers made since the month of February last with either the High Level or Middle Level Sewer, motion to stand over until the Hearing, with liberty for either party to apply in the meantime, especially in respect of any injury that may be apprehended from the unhealthy effluvia arising from the increase of sewage matters brought down the Middle Level Sewer (a).

(a) This motion was renewed on the 6th July, on further affidavits as to the increased foulness of the River Lee; but, after having been discussed at some length, it was referred to Capt.

Galton, R.E., to determine what steps ought to be taken by the Board to abate the nuisance; which has resulted in the partial opening of the Outfall Sewer.

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*June 3rd & 5th.**Pleading—Demurrer.—Multifariousness.*

There is no equity to maintain a Bill against the representatives of a person who was accessory to a fraud, from which he derived no pecuniary benefit, merely on the ground that, if alive, he might have been made answerable for costs.

The relation between managers of a Company and the shareholders in respect of shares in the Company is not analogous to the relation of trustee and cestui que trust in respect of the trust property.

Therefore, one such manager who assists another to deal fraudulently with the shares is not answerable, as a trustee would be who knowingly permits his co-trustee to make default.

WALSHAM ^v STAINTON.*Remitted 1 Feb. 1866 -*

THIS cause came on on the demurrer of the Defendant *Horn*.

The material allegations of the Bill were as follows :—

1. The *Carron Co.* are a corporation incorporated by Royal Charter in 1773, and whose affairs are regulated by two deeds, dated respectively in 1760 and 1771.

2. By the later of these deeds it was provided that the capital of the Company should be £150,000, in 600 shares of £250 each; and no future partner was to have any vote in the management unless he held at least ten shares: and all holders of ten shares or more were to have one vote for every £2500 capital stock in their possession. Two general meetings were to be held every year at *Carron*; and a committee of management was to be appointed, which was to meet once a month, and part of whose business was to be “to receive all intimations with regard to the sale or disposal of any part of the stock of the Company.” All shareholders, present and future, were to be at liberty to sell their shares, or any number not less than two of them, on the following conditions:—Such partner was to make intimation in writing to a monthly meeting of the number of shares he proposed to sell, and the price at which he proposed to sell them; and if the Company, or any existing shareholder, chose to buy them at that price before the second monthly meeting, they and he were to be at liberty to do so; but if not, then the shares might be offered to the public at that price, but not at any lower price without a fresh reference to the committee; and no

sale of any shares to strangers was to take place till the said offer had been made to the Company at a monthly committee, and rejected by the second following one; and all shares sold or attempted to be sold in contravention of this rule were to be ipso facto forfeited to the Company.

No future partner whatever was to be entitled to examine the Company's books at his pleasure; but every partner entitled to vote in the direction of the Company's affairs was to have a right to attend the meetings of a monthly committee, and to see and examine the procedure had by them; and might, in case he should find fault with the committee, represent the same, and move for redress at general meetings. It was, therefore, expressly provided and declared, that the Company's books should be only open to the inspection of the then present partners, and of the monthly committees at their meetings, or of any member having authority or commission from the committees to examine the same; with a proviso that any two partners holding not less than twenty shares might obtain such authority from the committees on proper cause shewn.

3. *Francis Garbett* was one of the then present shareholders in the Company, and one of the persons mentioned as a shareholder in the Charter of Incorporation; and he was in the month of March, 1771, the holder of fifteen shares in the Company.

6. In March, 1771, these shares were deposited with *Glyn & Co.* to secure the balance of a current account.

56. The debt due to *Glyn & Co.* has been long since paid off; and *Glyn & Co.* have not now any interest in the property.

7. The said *Francis Garbett* and other persons had in the year 1770 granted bonds to certain persons (who were

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afterwards represented by *Charles Selkrig*), as trustees for their creditors. *Francis Garbett* died on the 9th January, 1800, and the Plaintiff was his legal personal representative.

10. In the year 1810 *Selkrig*, without notice to any one interested in *Francis Garbett's* estate, procured himself to be made executor creditor, on behalf of Mr. *T. Fairholme*, to the extent of forty of the said fifty-five shares.

11. From 1786 to 1825, *Joseph Stainton* was manager of the Company at *Carron*; and from 1808 to 1851, *Henry Stainton* was *London* agent of the Company.

12. The Company did not long continue to act accurately under the deed of settlement. The last monthly committee meeting took place in 1813, and since then no such committee had ever been appointed. The committee never held monthly meetings, but generally met five or six times a year up to 1810, once in 1811, once in 1812, and four or five times in 1813, when they ceased to meet.

13. In April, 1813, *Glyn & Co.* offered to sell thirty of the said fifty-five shares to the Company.

14. *Joseph Stainton* agreed to be the purchaser; and in January, 1815, fifteen of such shares were transferred to him by deed, and entered as transferred in the books of the Company at a meeting at which *Joseph Stainton* alone was present, holding proxies for six others, including *Henry Stainton*.

16. At a similarly attended meeting held 15th June, 1815, *Joseph Stainton* produced (to himself) a power of attorney, authorising *Alexander Smith* to receive the dividends on these shares which might become due to *Glyn & Co.*

17. On the 29th September, 1817, *Selkrig* offered the

remaining forty shares for sale to the Company at a price fixed in the said offer, which was afterwards accepted by *Henry Stainton*; and such shares were accordingly transferred to him at a general meeting, at which *Joseph Stainton* (with the same six proxies) and *Joseph Dawson* alone were present.

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21. The accounts and books required by the charter and deeds of settlement were regularly kept, but the accounts were not examined with the vouchers, or certified as correct.

As regards the accounts at *Carron* it was the custom of *Joseph Stainton* to make out half-yearly balance sheets, which were submitted to the next general meeting, and compared with the ledger by the book-keeper and two members of the Company, one of whom was usually the manager and the other the president of the meeting; and if the said balance sheet agreed with the ledger, a certificate thereof was entered in the books of the Company and signed.

22. *Henry Stainton* was frequently the president of the general meetings, and the person who, along with *Joseph Stainton*, compared the balance sheets with the ledger and certified the result in the books of the Company.

23. From 1805 to 1839, both inclusive, an unvarying dividend at the rate of £9 per cent. per annum was paid.

24. *Joseph Stainton* died in 1825, and the demurring Defendant is his legal personal representative in *England*.

27. *Henry Stainton* died in 1841, and the remaining Defendants (other than the *Carron Company*) are his legal personal representatives.

28. The Plaintiff in the year 1860, for the first time,

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ascertained (as the fact is) that the aforesaid sales of the said fifteen shares to the said *Joseph Stainton* and of the said forty shares to the said *Henry Stainton* were, under the circumstances hereinafter appearing, fraudulent and void.

29. *Joseph Stainton*, from the time of his becoming manager at *Carron*, introduced from time to time into the Company his own immediate relations, and obtained by his influence their appointment to fill all offices of trust therein.

30. *Joseph Stainton* and *Henry Stainton*, taking advantage of their respective positions in the Company and in collusion with the *Dawsons* (their nephews), entered, long previous to the year 1815, into a scheme to secure to themselves the whole benefit of the Company, and with that view conspired together to procure the discontinuance of the committees of management, where proxies were not allowed, and to keep the accounts of the Company fraudulently, so as to conceal from the shareholders the real value of the shares, in order that they (the *Staintons*) might buy up at an undervalue such shares as were offered for sale, and at the same time make themselves a majority of votes at the meetings of the Company.

31. Such fraudulent scheme was carried into effect in the following manner:—

32. *Henry Stainton* had, long before the year 1815, with the knowledge and privity of and acting in collusion with *Joseph Stainton* and the *Dawsons*, retained in his own hands a very large fund belonging to the Company, but which did not appear in the books of the Company at *Carron*.

33. Such fund arose as follows:—The Company had for many years previous to 1815 been in the habit of supplying the Government largely with gun-mortars, shot, and

other military stores, which were manufactured at the works at *Carron* and sent thence by sea to *London*, consigned by the manager at *Carron* to the agent in *London* for delivery to the Board of Ordnance. A separate account was kept in *London* and at *Carron* for this branch of the business, called the "Ordnance Account."

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34. *Joseph Dawson* and *Joseph Stainton*, when they shipped a consignment to *Henry Stainton*, used to invoice the goods to *London* and to debit them to the Board of Ordnance in the books at *Carron* at a price much less than that at which they had contracted to sell them to the Board of Ordnance. *William Dawson*, who was manufacturing clerk and had the charge of manufacturing the goods, and the duty of seeing that they were properly made and despatched, used to enter into a book the prices at which the goods manufactured at *Carron* were to be issued; and from this book the invoices of goods were made out when they were despatched; and he fraudulently entered the goods made for the Board of Ordnance at prices far below those which he knew the Board of Ordnance had agreed to pay. After the said Board had paid the full contract price, *Henry Stainton* entered the sums which he actually received to their credit in the separate account with them kept in the books of the *Carron* Company at *London*. He, however, remitted to *Carron* only the sums at which the goods were invoiced thence to him, the difference between these sums and the sum paid by the Board of Ordnance being retained and invested in *Joseph Stainton's* name. The sums so retained were carried to a secret account kept by *Henry Stainton*, and sometimes called by him the "Outcome of the Board's Account," and sometimes "the Deposit." It is herein-after referred to as "the Secret Reserve Fund."

35. Between the years 1808 and 1816 the Company had very large transactions with the Board of Ordnance, and

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this course of conduct was continued during all that period. On the 1st of January, 1808, the Secret Reserve Fund amounted to £80,000 stock. Between the years 1808 and 1816, £110,000 stock had been purchased for this fund, and stock to the amount of £70,000 had been sold for the use of the Company; and in the year 1816, the Secret Reserve Fund consisted of £120,000 Consols. The dividends upon the stock so from time to time purchased for the Company were regularly carried to the credit of the Company in the books at *Carron* from the year 1808 to the year 1816; but the capital stock nowhere appeared in the books at *Carron* or in *London*.

36. Up to the year 1816, *Henry Stainton*, in the Ordnance Account sent from *London* to *Carron*, stated the sums received from the Board of Ordnance at the true amount paid by the Board; so that the Ordnance Account in *London* showed that the Board had paid large sums in excess of what they were charged with. The sums so appearing to be paid in excess were stated in these accounts to be invested, and the mode of their investment was shown. When these accounts were received at *Carron*, *Joseph Stainton*, in transferring them to the books at *Carron* containing the Ordnance Account, altered them so as to make it appear that the only sum paid by the Board of Ordnance was the sum at which the goods had been invoiced from *Carron* to *London*, and he omitted all mention of the investment made by *Henry Stainton*. By this plan the Ordnance Account at *Carron* was kept apparently balanced up to the year 1816.

37. After the year 1816, *Henry Stainton* continued to state the sums received from the Board at their actual amount, and these sums were accurately transcribed into the books at *Carron*; so that it there appeared as though

the Board had paid in excess of what was due from them.

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38. In the year 1811, *Joseph Stainton* wrote a letter to *Henry Stainton*, which shows that he was a party to this contrivance.

39. In the year 1850, *Henry Stainton* admitted in a letter to *William Dawson* that the Secret Reserve Fund then amounted to £96,046 14s. 5d. This letter speaks of the fund as "the reserve account long ago put into my hands for safe and secret custody." The letter also contains the following passage—"The whole, being the property of the *Carron Company*, stands in my name, and is entirely unknown to any one here besides myself. How far it may be prudent to communicate this fact is for you to judge; that it should be communicated to the partners generally would in my opinion be exceedingly indiscreet. It was originally intended to form a fund to meet any unforeseen occurrence in the business, such as for instance the present and prospective state of the iron trade, without making any public difference as to the Company's proceedings in money matters."

40. The existence of the Secret Reserve Fund was not known to any member of the Company other than the *Staintons* and the *Dawsons* until the year 1852; but after that date its existence was disclosed, and it was subsequently paid or accounted for to the Company.

41. *Henry* and *Joseph Stainton*, between the years 1808 and 1817, retained in their hands very large sums, which they did not account for to the Company.

42. Shortly before the half-yearly meetings, *Henry* and *Joseph Stainton* used to prepare "trial" balance sheets of the Company. These balance sheets were not intended to

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be adopted, but were meant to put *Henry Stainton* in possession of the true state of the accounts, so as to enable him to prepare fictitious accounts for adoption by the meeting.

43. Under these circumstances, the real value of the shares in the Company was not known.

44. Since the death of *Henry Stainton*, proceedings have been instituted against his estate, and it has been compelled to refund sums amounting to £220,000 to the Company, and a further sum is still claimed by the Company.

47. Under these circumstances, the said fifteen and forty shares were purchased by *Joseph* and *Henry Stainton* at a great undervalue.

The Bill also contained allegations for the purpose of explaining the delay in bringing the suit, and of negating certain anticipated defences not material to the question raised by the demurrer, and prayed—

1st. That the sale of the forty shares to *Henry Stainton* ought to be set aside, and the shares retransferred to the Plaintiff.

2ndly. The like with regard to the fifteen shares sold to *Joseph Stainton*.

3rdly. An account of dividends and bonuses paid in respect of such shares since the respective sales thereof.

4thly. An injunction restraining *Henry Stainton's* executors from transferring the forty shares.

5thly. An injunction restraining the *Carron Company* from refusing to concur in a transfer of these shares to the Plaintiff.

6thly. That the Defendants other than the *Carron Company* might pay the costs.

Sir *Hugh Cairns*, Q.C., and Mr. *John Pearson*, for the demurrer :—

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1st. The Plaintiff has shown no title to institute the suit.

In 1813, *Glyn & Halifax* were the persons entitled to the fifteen shares bought by *Joseph Stainton* ; therefore, if any one were injured by that sale and purchase, *Glyn & Co.* would be the proper persons to complain of it ; but there is no allegation that they were deceived in the matter.

The statements in the paragraphs 32 to 43 inclusive, so far from showing any fraud on the part of *Joseph Stainton*, disclose a very proper and prudent course of management. This is shown by the fact that a constant dividend of £9 per cent. was paid from 1805 to 1839, notwithstanding the fluctuations in the trade ; and it appears that this was in part at least effected by sales of the Secret Reserve Fund.

Our contract was made in 1813, and there is nothing to show that there then was any secret fund at all.

2ndly. The relief is not one which can be given by a Court of equity.

With regard to *Henry Stainton* they ask that the contract may be set aside and the shares restored to them. But as against *Joseph Stainton* they ask nothing but pure damages—viz. the difference, with interest, between the sum which he ought to have received and did receive in 1813. But this Court, (except under the authority of the new statute (a),) never gives damages as such except in cases of mesne profits : *Powell v. Aiken* (b).

The only remedy against *Joseph Stainton* would have been by action of deceit, and that action could not have been brought after the expiration of six months from *Joseph Stainton's* death.

(a) 21 & 22 Vict. c. 27.

(b) 4 K. & J. 343.

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3rdly. The Bill is multifarious.

Why should we be mixed up with the case against *Henry Stainton*? The contracts are different, the sales distinct, and quite different defences might be taken. There is nothing in common between the sales except that both vendors deduce their title from *Garbett*, who is not the vendor in either case.

This is simply a case where a mortgagee with a power of sale has sold the property, and the mortgagor afterwards comes to complain that it was sold at an undervalue. We do not dispute that a Court of equity has jurisdiction to undo a completed transaction of this nature; but that jurisdiction is precisely analogous to proceedings at law upon an averment of "scienter:" *Wilde v. Gibson* (a).

Mr. *Giffard*, Q.C., and Mr. *Eddis* for the Bill:—

Demurrers raising these points were put in by the other Defendants and overruled by the Lords Justices.

[The VICE-CHANCELLOR.—The question is, 1st. Were not these shares sold at an honest price? 2ndly. Can you have a Bill for damages thirty years after the death of the wrongdoer?]

Mr. *Giffard*.—The case of *Blair v. Bromley* (b) is an authority on the second point. We are the personal representatives of the persons injured, and the fraud is one but recently discovered.

[The VICE-CHANCELLOR.—I know of no case determining that you can bring a man here, merely because he is the representative of a person who, if alive, would have had to pay costs.]

Mr. *Giffard*.—This was one entire fraud concocted by

(a) 1 H. L. Cas. 605.

(b) 2 Ph. 354.

Joseph and Henry Stainton, commencing as early as 1808, for the purpose of getting all the shares in the Company, including these fifty-five shares of *Garbett's*, into their hands: *Att.-Gen. v. Cradock* (a).

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The case is simply this:—My trustee withdraws from the trust estate a certain sum to induce me to believe that the trust fund is smaller than it is in reality, and he then, while I am under this misapprehension, gets me to sell my share to him at an undervalue.

It would be contrary to the practice of the Court to take such an account as this against one trustee alone; and therefore *Joseph Stainton* would have been a necessary party with regard to the forty shares, irrespective of any question affecting the fifteen shares. Are we to file two Bills, one for each set of shares, when each Bill would have to be against the very same parties, and would contain precisely the same allegations?—*Campbell v. Mackay* (b); *Innes v. Mitchell* (c).

Besides, it is a mere assumption to say that *Joseph Stainton* had nothing to do with the forty shares.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think the allegations I have here are insufficient to maintain the Bill against *Joseph Stainton*, even taking it as a Bill against him alone; but I further think that the remedy against him should be pursued separately.

Judgment.

The case is shortly this:—Thirty-eight years after the time when you say that the fraud was committed, you come

(a) 3 My. & Cr. 85.

(b) 1 My. & Cr. 608.

(c) 4 Drew. 57.

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here to charge therewith a person who at third or fourth hand represents the alleged author thereof.

After so great a lapse of time, there is all the more necessity that the allegations of fraud upon which the equity of the Bill is founded should be exceedingly particular and precise. But upon this Bill I not only do not find anything of that sort, but I do find enough to lead me to think that the Bill is not susceptible of any amendment which could be sufficient for this purpose.

The price to be paid for these shares—£133 per cent. of their nominal value—was fixed in 1813. The purchase was completed in 1815. But I find no specific allegation of fraud definitely pointing at either of those years.

The fraud alleged begins at paragraph 30. [His Honour read it]. The expression “long previous to 1815” is not sufficiently precise to invalidate a transaction which occurred in April, 1813; it may well be that “long previous” does not include this particular time. Then we have in paragraph 33 the words “many years previous to 1815.” This is all that is fixed as to date; and, although “many years previous to 1815” must of course be taken to go beyond 1813, yet all that is specifically stated regarding that “many years” is, that during all that time the Company had dealings with the Board of Ordnance; which is obviously not an allegation of fraud. When we come to paragraph 35, we have a statement carrying back this particular course of dealing as far as 1808, which would, of necessity, include 1813; but this paragraph contains no averment that the stock there mentioned was not properly applied; and it is clear that £70,000 was so applied. Then it is said, that in 1816 a sum of £120,000 Consols, which belonged to the *Carron* Company, was standing in the name of *Joseph Stanton*, and that the dividends thereon were

regularly carried to the credit of the Company. I do not see anything amounting to fraud in this.

All that appears in favour of the Plaintiff in these averments is, that in 1808 the reserved fund was £80,000 ; that £70,000 (part thereof) was afterwards rightly applied ; and that in 1816 the fund had risen again to £120,000. Nothing is said as to what became of the £10,000 not stated to have been properly applied ; and I cannot assume that it was misappropriated.

Up to 1816 it appears that *Henry Stainton* stated the true amounts of all these Government sales in the books in *London* ; there is, therefore, so far nothing kept back. Up to 1816 everything is straight and proper in the *London* books ; but then it is said that *Joseph Stainton* at *Carron* altered the accounts so as to falsify the books there. [His Honour read paragraph 36]. There is nothing up to this which would have the effect of deceiving purchasers in *London*.

Then there is set out a letter of 1811, written by *Joseph Stainton*, which shews that he was cognizant of the existence of "the outcome account ;" but when I couple this with the fact that £70,000 is admitted to have been properly applied after the date of this letter, and bear in mind that nothing is said as to the application of the remainder of the reserve fund then existing, I do not see any reason for presuming, as against this Defendant, a fraud which is certainly not distinctly alleged. When we go back to 1813, I find no averment that there was then any secret fund which could affect the price of shares.

I now come to the allegation contained in the 41st paragraph of the Bill. *Henry* and *Joseph Stainton*, between the years 1808 and 1817 (that may mean 1814, 15, 16, 17), retained in their own hands very large sums belonging to the Company ; but it does not appear that the value of

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these or any other shares was affected thereby. Then nothing more is alleged which is material to this point till we come to the averment that these shares were sold at an undervalue; but it is quite consistent with this averment, that the entire loss accrued in respect of the forty shares, and that the fifteen shares at present in question realised their full value. Then comes the statement that this alleged fraud was not found out until a late date. I agree that it is immaterial whether Messrs. *Glyn & Co.* joined in this fraud, if there were a fraud; but I do not find anything even leading to the presumption that they did so, or that the sale by them was not in every respect proper and bona fide.

I may here remark, that if my decision in this case turned upon the insufficiency of allegations such as these I should certainly give leave to amend; a leave which I only withhold because I think that in no form in which these facts could be presented to the Court, would they be sufficient to maintain this Bill.

Even if I were inclined to allow the Bill to be amended as regards the allegations by which an equity is attempted to be raised, I should still feel compelled to allow this demurrer for multifariousness. I think that the two cases (against *Henry Stainton* and *Joseph Stainton*) should be brought forward separately, and for the following reason: if these two gentlemen are so tied together that they would both be necessary parties to a Bill filed in respect of either one of these sales alone (and that is necessary to bear out Mr. *Eddis's* argument), it would follow that *Joseph Stainton* would be responsible for the forty shares sold to *Henry*, as well as for his own fifteen; that is to say, that *Joseph's* representatives are to be considered as sureties for the acts and defaults of *Henry* in respect of these shares, and would therefore be necessary

parties to any Bill against *Henry*; and the case was compared to that of a trustee who stands by and sees his co-trustee make away with the fund. But the obvious answer to this view of the case is, that all *Henry Stainton's* shares are in existence; and it is, upon the allegations in this Bill, the clear right of the Plaintiff, if he have any right at all, to enforce a lien on these shares. The only case for relief which he could therefore make against *Joseph Stainton* in regard to these forty shares would be in respect of dividends and bonuses; and, accordingly, when we come to the prayer of the Bill we find that this, and this only, is the relief asked against this Defendant in respect of the forty shares. [His Honour read the third paragraph of the prayer.]

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It does seem to me entirely novel to say that a party cognizant of and conniving at a fraud (I put the case as high as that), who has received no part of the money, and has not reaped any advantage from the fraud, can be pursued in this Court for the recovery of damages merely. This is not a case of co-trustees such as I have already alluded to, but merely a case where two persons, both managers of the same Company, have combined to conceal the true state of the Company's affairs. But, suppose two agents to have been severally guilty of such conduct, and suppose further that *A.* has the funds, and that his representatives have been held liable to make good a great difference between the value at which the shares were purchased by *A.* and their true value, how can I make *B.* liable for that in this Court? If liable at all it must be by action at law; an action of deceit for having by false representations induced you to sell.

It is true that this Court will deal with any one who has been privy to a fraud of this kind, even though he may not have got any part of the fund, and will, in his lifetime,

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compel discovery from him, and make him answerable for costs; but I do not know of any case where executors have been made liable in this way, where it is not asserted that any direct benefit accrued to the assets in their hands.

Assuming it to be clearly the case that such a concealed fraud as that which might be made to appear by amendment of the present Bill had in fact taken place, and that *Joseph Stainton* had in fact received a benefit therefrom, that would raise a case against him and his estate; but it does not seem to me that such is the fact: and on a case like this I cannot allow *Joseph's* executor to be brought here to answer for *Henry's* defaults.

If any amendment consistent with what seems to be the truth could cure these defects, I would give leave for the purpose; but it appears to me that even if made as strong as the facts will bear, the Bill would still be open to fatal objections. I must therefore allow the demurrer generally, and decline to give leave to amend.

Demurrer allowed with costs.

July 2nd, 8rd.

Covenant
against Trade
—Construction.

A covenant not to be engaged in a specified trade, "or in any matter or thing whatsoever in anywise relating thereto" within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the said limits upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business.

Semble: A mortgage expressly charging the debt upon such profits would be a breach of the covenant.

Semble also: There is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up, and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively.

BIRD v. LAKE (No. 2).

BIRD v. TURNER.

THE material facts of this case will be found *ante*, p. 111.

Since the date of the order there reported the Defendant *James Lake* had entered into partnership with *George*

Augustus Turner (who was brought before the Court by Supplemental Bill); and by the partnership deed it was provided that *Turner* should (in effect) pay one-half of the purchase-money to *George Lake*, and should be interested in one moiety of the business; and it was stipulated, that so long as anything was due to *George Lake* on his mortgage, the partners were only to draw £5 per week each from the profits for subsistence-money, and that all the surplus profits, after providing for certain specified charges, should be applied in reduction of *George Lake's* debt; and there was a provision that *James Lake* and *Turner* (who were both *sui juris*) might by mutual consent vary or cancel the deed.

The Plaintiffs had taken considerable pains to trace the sums alleged to have been paid by *James Lake* to *George Lake* as part of the purchase-money of the business; and they had succeeded in casting grave doubts on the accuracy of the story told by these Defendants in relation to this transaction, but nothing amounting to fraud was proved.

It appeared that the "Anchor" had on the 13th June been opened as an eating-house by *Lake* and *Turner*, and that they had ever since been carrying on a very successful business there.

George and *James Lake* and *Turner* were cross-examined at great length in open Court, but nothing material was elicited.

Mr. *Daniel*, Q.C., Mr. *Cleasby*, Q.C., and Mr. *Bagshawe*, for the Plaintiffs, now moved that the Defendants *George* and *James Lake* should be committed for breach of the injunction granted on the 25th May (a); and for an injunction to restrain all the Defendants from carrying on the said business on the said premises, and from assigning

(a) Ante, p. 122.

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 —

letting, or otherwise disposing of the premises, or any share or interest therein, whilst fitted up as an eating-house, to any other person.

Covenants are to be interpreted not according to the literal acceptance of the words, but the manifest intent of the parties: 2 *Smith's Leading Cases* (a), *Griffith v. Goodhand* (b).

Here it is evident that the intention of the parties was that *George Lake* should not be concerned in setting up a rival house.

[The VICE-CHANCELLOR.—Might not he lend money to a rival eating-house keeper on his bond, even though he might know that he had no means of paying except out of profits?]

Mr. *Cleasby*.—That may be so; but here he is the soul of the whole transaction: the others are merely his puppets.

At any rate, *George Lake* is supporting this house with his capital, and that is “a matter relating thereto” in breach of his covenant.

Sir *Hugh Cairns*, Q.C., and Mr. *Rudall*, for *George Lake*; Mr. *Giffard*, Q.C., and Mr. *Hopwood*, for *James Lake*; and Mr. *Rolt*, Q.C., and Mr. *Lindley*, for *Turner*; were not called upon.

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The Plaintiff stands here solely on his legal right under the covenant, which I must take care shall not be infringed.

(a) 5th Ed. p. 449.

(b) Sir T. Raym. 464.

George Lake dissolved his partnership with *Hill* in 1856, and it was then agreed between them that he should not use any means to injure the business he was selling, in the following terms:—[His Honour read the agreement, see *ante*, p. 112].

Then when the parties are afterwards carrying this agreement into effect by a deed, they recite the agreement, and introduce into the deed, as founded thereon, the covenant in question. [His Honour read it, see *ante*, p. 112].

Now, giving all possible weight to the authorities which state that you must gather the purport of the covenant from the intent of the whole instrument, I do not think that I can hold this covenant to have been infringed.

Covenants of this kind are sometimes held to be restricted by the recitals in the deed, but I never knew of a case in which such a covenant was enlarged by the recital, and I do not think that this particular recital could in any case have that effect.

I agree that the covenant and recital should be read together; but I think, that, giving their full effect to the general words contained in this covenant, there is nothing to prevent *George Lake* from lending his money to any person on whose bond he might be content to rely, even though he might know that such borrower was about to open an eating-house within the prohibited district, and that there was really no security for the payment of his debt except the profits of the business.

Mr. *Bagshawe* says "You cannot employ your capital in any way in the business;" but this seems to me far too extensive a construction of the covenant: it can be carried to this extent, and no further—that he will not act as director, manager, assistant, &c., perhaps not even as waiter, in such an establishment; but it is impossible to contend that he may not advance money to enable others to do so.

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Mr. *Cleasby* was therefore, I think, well advised in grappling at once with the chief difficulty, and arguing the question on the assumption of perfect bona fides.

It is admitted that *George Lake* originally intended to break his covenant; he thought he could honestly do so paying the penalty; then he was advised that all he could do was to part with the business. Now, suppose that there was no antecedent connection between vendor and purchaser, and that he had sold this business to a stranger on the terms now relied on, namely £8000, of which £500 are to be paid down, with an undertaking of the vendor to lay out £1500 in fitting up the premises, and a mortgage of such premises to secure the whole of the purchase-money and interest, payable by instalments, with a peremptory power of sale on default, but without any stipulation that any payment should be made out of profits: I further assume that he knew that he had only the profits to look to for payment: all this would not be a breach of the covenant—it merely amounts to an advance of money to an eating-house keeper. As I read the covenant, there is nothing to prevent *Lake* from buying any number of eating-houses and selling them again, if the sales be bonâ fide.

When this case was before me on the 25th of May I was not satisfied that this gentleman really intended to leave the business, and I therefore granted the injunction in terms which were directed against the scheme which I suspected.

But I think that the partnership of June 13 sets that question at rest: there seems to have been a bonâ fide payment on the part of *Turner*; and there is no trace of *George Lake's* hand in the arrangement in any form which would give him a lien on the profits. True, the partners agree inter se to appropriate the profits to the redemption of their borrowed capital, which is a very reasonable arrangement as between them; and I cannot infer anything from the provision, sin-

gular as it is, that two persons, both of whom are *sui juris*, may by mutual consent alter their own deed. It seems to have been inserted *ex abundanti cautela* by the conveyancer who prepared the deed, probably to enable them more effectually to exclude *George Lake* if the existing deed were held to give him an interest in the business.

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Of course, *Turner* is a purchaser with notice; but he had notice merely that *George Lake* cannot open this house for his own benefit, and he had notice also that the house had not been so opened.

No order on the motion. Costs to be costs in the cause.

KING v. BELLORD.

THIS was a Bill by a purchaser for specific performance of a contract for the sale of a piece of freehold land.

The land was devised by one *John Roche* to the Defendants, *James Bellord*, his son *James Bellord* the younger, and *James Abbott*, and their heirs, upon trust, that they or other the trustee or trustees of that his will should, when it should seem to them or him expedient or necessary so to do for the purpose of the will, sell and dispose of the same, either together or in lots, and by public auction or private contract, and generally in such way and manner as they or he should think fit; and should until such sale as aforesaid manage the same premises, and should if need be, but not otherwise, out of the moneys to arise from the sale of his said freehold hereditaments, pay his debts, and funeral and testamentary expenses; and upon further trust to apply the proceeds of such sale for the benefit of testator's children as therein mentioned; and the trustees or trustee of the will were empowered to give effectual re-

July 1st & 8th.
Infant Trustees
—Trust for
Sale—
Discretion—
Capacity.

Although a power simply collateral may be exercised by an infant, a devise to an infant and others upon a discretionary trust for sale cannot be exercised by them.

Devisees on a discretionary trust for sale (one of whom was an infant) having contracted to sell, held on a Bill by the purchaser for specific performance that the contract was void, and Bill dismissed accordingly.

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ceipts and discharges for any sums payable to them or him by virtue of the will. No beneficial interest was given to *James Bellord* the younger.

The land in question was put up for auction by the trustees (the Defendants), and purchased by the Plaintiff. On investigating the title it appeared that *James Bellord* the younger was at the date of the sale a minor of the age of seventeen, and the Defendants thereupon stated that the sale had been directed in forgetfulness of the fact, and offered to return the deposit, and pay the Plaintiff's costs of investigating the title. This was not accepted, the Plaintiff insisting that the vendors should make an application under the Trustee Act; and ultimately the Plaintiff filed this Bill for specific performance.

Mr. *Pemberton*, for the Plaintiff:—

The Defendants refuse to complete on the ground of the infancy of one of them. The infant can effectually join in selling and conveying these lands, he being a bare trustee empowered to sell and having no beneficial interest. The principle is, that a testator, or any one else, may delegate powers to an infant waiving the incapacity, just in the same way as a power may be given to a married woman notwithstanding coverture.

The authorities as to the exercise of powers by infants are discussed in "*Sugden on Powers*" (a); and the cases are given fully in the Appendix (b).

The result is, that an infant may clearly exercise a collateral power; and the only doubtful point is, whether he may not exercise a power over an estate in which he is interested.

(a) 8th ed. p. 177.

(b) Page 910.

[The VICE-CHANCELLOR.—All those cases are on powers. This is a trust.]

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I submit that that strengthens the case, because the sale must be made in order to carry out the will, whereas a power might be purely optional. There can be no doubt that a testator can waive the incapacity of infancy as well as that of coverture, if he chooses to do so. If the words "notwithstanding infancy" had been added, there would have been no question, and the fact of naming the minor a trustee implies the same thing. If this were not so all the trusts of the will must fail.

Mr. *Giffard*, Q.C., and Mr. *Ramadge*, for the Defendants :—

The answer to the whole argument is, that this is a trust and not a power ; and it is a discretionary trust, which cannot be exercised by an infant. The theory on which all the authorities cited as to powers proceed, is, that the act done is the act of the donor of the power, the donee being a mere instrument or conduit pipe. Therefore, it is said, the donor of the power may use any hand he pleases, notwithstanding incapacity. It is an act done in substance in the name of the person who created the power, and in law it is his act.

[Mr. *James*, *Amicus Curia*, mentioned a recent case of *Jones v. Jones*, where the Vice-Chancellor had considered that it was no objection to a contract for the purchase of a colliery, that the purchaser had employed an infant as his agent. The point, however, had not called for a decision.]

Mr. *Giffard*.—That is my distinction. An agent or the donee of a power acts in the name of the principal or the donor ; but a devisee in trust acts for himself, and this an infant cannot do. The Plaintiff admitted the real difficulty

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by asking for the appointment of a new trustee to convey. This implies, that before the Trustee Act the Court could not have specifically performed the contract, if it were one. And the Trustee Act has not enlarged the power of the Court in specific performance, because all it does is to enable the Court to deal with the legal estate in cases where, without it, it would have bound the equitable interest. If the infant cannot convey he cannot sell, and the contract is a nullity. In fact, the test in every case of specific performance is, whether there is a contract on which damages could be recovered at law. Here there is not, for the Courts of law would look on the infant merely as devisee without regard to the trust, and of course a mere infant devisee cannot sell. The contract therefore is altogether void.

Similar questions have arisen as to the capacity of an infant to become a shareholder : *Stikeman v. Dawson* (a); in which the old case of *Scroggan v. Stewardson* (b) is mentioned, where it was said that an infant could not consent to have her own hair cut off. The cases mentioned by Lord *St. Leonards* favour the distinction between trusts and powers, especially *Grange v. Tiving* (c) and *Hearle v. Greenbank* (d); and all the authorities are limited to powers simply collateral. Further, an infant cannot exercise any kind of discretion : *Lewin on Trusts* (e); and this trust gives a large discretion both as to the time and manner of sale.

In *Porter's Trusts* (f), it was considered that an infant trustee was incapable of acting; and the purchaser here is clearly not entitled to a vesting order under the Trustee Act : *Re Carpenter's Trust* (g).

Mr. *Pemberton*, in reply.—The arguments on the other

- (a) 1 De G. & S. 90.
- (b) 3 Keb. 369.
- (c) Bridg. 107.
- (d) 3 Atk. 695, 712.

- (e) P. 29.
- (f) 2 Jur., N. S., 349.
- (g) Kay, 418.

side have not touched my position. The testator had power to waive the incapacity by express words; and from the will it must be assumed that he knew he was appointing an infant, and therefore the waiver must be implied.

The note cited by Lord *St. Leonards* from Mr. *Preston* (a) is expressly in point.

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VICE-CHANCELLOR SIR W. PAGE WOOD:—

The point raised in this case, though not covered by express decision, seems to fall within the general rule that an infant is incapable of entering into a binding contract. The actual contest arises thus:—A testator having chosen to devise estates, upon trusts requiring discretion as to the expediency, as to the time, and as to the manner of a sale, to three persons, one of whom is an infant, the question is, whether a contract for sale entered into by those three trustees is a valid contract, which this Court can specifically perform. There are numerous authorities which approach this question, but none which decide it. All of them are distinguished from this case by the well-known difference between power and property, a marked distinction which has been invariably upheld.

Judgment.

There can be no doubt upon the authorities from the earliest times, that if a man, by his will, gives an infant a simple power of sale without an interest, the infant may exercise it. All the decisions on the subject are referred to by Lord *St. Leonards* in his work on "Powers," and I need not discuss them minutely. They all turn on the execution of powers; and there is not a single authority upon the question whether an infant can sell an estate devised to him upon trust for sale. There is an opinion of Mr. *Preston's* mentioned without disapproval by Lord

(a) Sugd. Pow., p. 911.

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St. Leonards, that an infant can exercise a power even though it be coupled with an interest ; but that is very different from selling an estate vested in the infant by a devise in fee.

It is to be observed, that all the cases relied on with reference to powers, have gone upon the principle that the infant, in executing the power, is a mere conduit-pipe, as it has been termed, of the will of the donor of the power ; so that when the estate is created, the infant (as was said in the case in *Bridgman*) is merely the instrument by whose hands the testator or donor acts. The donor, it is said, may use any hand, however weak, to carry out his intentions. This principle fails altogether to reach the case of a devise in trust to an infant.

It is not in the power of a testator to confer upon an infant a capacity in himself which the law does not give him, although he may make the infant his hand, his agent, to execute his purpose. He cannot give an estate to an infant and say that he may sell it, when the law says that he cannot do so. It is unfortunate that the testator should have selected an infant as a trustee ; but the inconvenience arising from this circumstance in the particular case, is not to be compared with that which would result from holding an infant to have a capacity to sell, which the law denies him. If the Defendants still adhere to the offer made by them before the litigation, I shall dismiss the Bill with costs.

Mr. *Giffard* repeated the offer.

Minutes.
 —

THE Defendants undertaking to return the deposit and pay the Plaintiff his costs of investigating the title, dismiss the Bill with costs.

WEATHERLEY v. ROSS.

THE Plaintiff was the owner of a house having five windows, which, by his original Bill, he alleged to be ancient lights. The Defendant was the owner of adjoining property, on which he had begun erecting a new house in place of one which he had recently pulled down. It was clearly made out that the Defendant's building would interfere with and obstruct the access of light and air to the Plaintiff's windows, to a greater extent than the old house had done. The main purpose of the suit was to restrain this interference.

A minor grievance was also stated in the Bill, the Defendant having, in his new building, encroached some inches beyond the boundary line between his property and the Plaintiff's. This was not denied; but at an early stage of the suit the Defendant, having discovered his mistake, offered to correct it, and had proceeded to do so before the hearing.

In his first affidavit, on a motion for injunction, the Defendant did not deny that the Plaintiff's windows were ancient lights, but alleged that he did not intend to carry his building so high as to interfere with them; but in his answer, and in subsequent evidence, he set up the further case, that none of the windows were ancient lights, inasmuch as the Plaintiff had, within twenty years, rebuilt his house, enlarged his windows, altered their position, and added new lights. The Plaintiff, however, insisted that he had not altered the size or position of any of the windows. Upon this contention being raised, an issue was directed to try the fact; and the jury found that none of the windows had been enlarged, that two of them were in the same position as the ancient windows which they replaced and were ancient lights, that one other was not

Dec. 17th.

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Jan. 18th.

*Easement—
Injunction—
Lights, partly
ancient and
partly new—
Obstruction—
Costs—Form of
Order.*

Plaintiff filed a Bill to restrain obstruction to lights alleged to be ancient. Defendant denied that they were ancient lights. On a jury trial, some were found to be ancient and the rest to be new or altered in position within twenty years. On Plaintiff submitting to an order to block up the new and restore the altered windows to their old position, an injunction was granted; but the costs of the suit, other than those of the issues, were ordered to be paid by the Plaintiff.

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ancient, and that the remaining two had been shifted in position on the rebuilding.

The case now came on for Hearing.

Argument.

Mr. Rolt, Q.C., and Mr. Eddis, for the Plaintiff:—

The finding of the jury that two of the lights are ancient is sufficient to entitle the Plaintiff to a perpetual injunction. It is settled law, that interference with privacy gives no right of action; and though it may be true that five windows, overlooking the Defendant's premises, may be a greater interference with his privacy than the two ancient windows, this is a consideration which the law of *England* does not regard, the sole basis of our law on the subject being the right to light and air, as distinguished from the privilege of privacy. Putting interference with privacy out of the question, there is nothing in the fact of the Plaintiff having opened additional windows to deprive him of the right to be protected against an invasion of his ancient lights. The Defendant, no doubt, may build so as to obstruct the new windows, provided he does not interfere with the old ones; but as to these we are entitled to an injunction.

It is true that a different view prevailed in *Renshaw v. Bean* (a), where it was said, that if it is impossible to obstruct the access of light and air to new windows, without also obstructing ancient windows belonging to the same owner, it is competent to a neighbouring owner to shut out light and air from the ancient windows to such an extent as may be necessary to obstruct the new lights. This was followed in *Jones v. Tapping* (b); but on the appeal of the latter case (c), the Exchequer Chamber did not altogether acquiesce in the doctrine. Two of the Judges, *Bramwell*, B., and *Blackburn*, J., went so far as to say that the doctrine laid

(a) 18 Q. B. 112. (b) 11 C. B. N. S. 283. (c) 31 L. J., C. P., 342.

down in *Renshaw v. Bean* (though the decision might be supported on other grounds) was not law; and those two learned judges held that the opening of new windows gave no right to a neighbour to do anything by which ancient lights might be obstructed. Others of the judges gave more qualified judgments; but they all agreed, that if there was any right to obstruct ancient lights at all, it could only be to the extent absolutely essential for the obstruction of new windows. At any rate, the Plaintiff has done nothing to abandon those ancient lights the position of which was altered, and by restoring them to their old position and closing the new window may entitle himself to an injunction: *Cooper v. Hubbuck* (a), *Wilson v. Townsend* (b), *Chandler v. Thompson* (c), *Luttrell's case* (d), *Binckes v. Pash* (e) *Moore v. Rawson* (f).

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—
Argument.

[The VICE-CHANCELLOR intimated that he should follow *Renshaw v. Bean*.]

Mr. Giffard, Q.C., and Mr. Nalder, for the Defendant:—

The only question of fact that remains, is, whether it is possible for us to block up the new windows without obstructing the ancient lights also. We say it is clear, from the plans and the evidence, that you cannot shut out light and air from any of the windows without obstructing all, to the full extent proposed by our plans. That being so, we are entitled to obstruct all the windows, as that course is the only way of protecting ourselves against the acquisition of new easements by the Plaintiff in respect of the new windows. The result is, that the Plaintiff can have no relief as to any of the windows.

There is another grievance set up, viz., the encroachment on the Plaintiff's land, which was accidental on the Defen-

(a) 30 Beav. 160.

(b) 1 Dr. & Sm. 330.

(c) 3 Camp. 80.

(d) 4 Rep. 86 a.

(e) 10 W. R. 424; 11 C. B. 324

(f) 3 B. & C. 332.

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dant's part, and was long since corrected by him. There can be no relief, therefore, as to this; and the Bill must, consequently, be dismissed, with costs.

[The VICE CHANCELLOR.—That might be the strict right; but in *Cooper v. Hubbuck* it was considered that a Plaintiff so situated might abandon the new windows; and that, on blocking them up, he would be entitled to an injunction to protect the others.]

Mr. *Giffard*.—That would be so, but it is a right which cannot be asserted in this suit. At this moment, the Plaintiff has no right whatever to an injunction, and no title to relief. Whether, at a future time, he will do anything to acquire such a right by blocking up the new windows, it is impossible to say. When he has done so, he can file a new Bill; but in the meantime, this, which has failed altogether, must be dismissed with costs. It is true, that, as a matter of indulgence, the Plaintiff may be allowed, on blocking up the new windows, to claim protection for the rest in this suit; and we do not object to this: but the indulgence can only be granted on the terms of his paying the costs. Up to this time the Plaintiff is wholly wrong, and will not become right until he restores the windows to their original position.

[The VICE CHANCELLOR.—It is not disputed, Mr. *Eddis*, that your client has a right to block up the new and altered windows, or restore them to their old condition, and then to have an injunction. The only remaining point is as to the costs.]

Mr. *Eddis* in reply.—There should be no costs. We claimed too much. They conceded too little. The jury found partly for one side and partly for the other. We are willing to restore the altered windows to their original position, and on doing this we shall obtain our injunction. It would be monstrous to force us to file a fresh Bill for the pur-

pose, or to make us bear the costs of a litigation, in which (as to part) we shall ultimately obtain the relief we ask.

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VICE CHANCELLOR SIR W. PAGE WOOD :—

This case has been extremely well argued by Mr. *Eddis* with reference to the position in which the Plaintiff is placed by the finding of the jury. This is very different from that which the Plaintiff assumed by his Bill. Then he claimed five ancient windows in one wall. He who comes into Court as a Plaintiff must rely upon the right which he claims and must establish it according to his allegations ; and especially in a case founded on a claim to ancient windows, where it turns out that the Plaintiff's assertion is wrong, it cannot be thought reasonable that the Defendant should be prejudiced by not having specially disputed the claim at the earliest stage of the cause.

Subsequently, the Defendant set up this case—that the Plaintiff had pulled down and rebuilt his house within the period of twenty years, and in so doing had altered the windows. The Plaintiff admits the re-building, but alleges that he placed all the new windows in the same positions which they formerly occupied, and did not increase their dimensions. Upon this, issue was joined, and a jury summoned. At the trial, the Defendant maintained that there was a substantial shifting of all the old lights, and further, that if that were not so, some of the windows were not ancient lights. What the jury found was, that none of the windows were enlarged ; that two of them remain in their original position, and are ancient lights ; but that two windows, the scullery window and another, have been shifted, and that the remaining window is new. This finding brings the matter within the rule established by *Renshaw v. Bean*.

Assuming that case to have been rightly decided, the question, whether the Plaintiff is entitled to obstruct the

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new lights by erecting a wall which will also obstruct the ancient lights, depends on the question of fact, whether or not it is impossible to obstruct the new without also obstructing the ancient lights. Upon the evidence, I am satisfied that it would be impossible for the Defendant in any way to erect a wall which would shut out light and air from the new windows as completely as any building on the Defendant's ground could do it, without at the same time obstructing the others. That being so, the principle of *Renshaw v. Bean* applies, and I have no hesitation in acting upon it. It would be a very strong decision on my part to overrule that judgment of the Court of Common Pleas, supported as it is by a majority of the Court of Exchequer Chamber, composed of the Lord Chief Baron *Pollock*, Justices *Wightman* and *Crompton*, and Baron *Martin*, although it is true that Justice *Blackburn* and Baron *Bramwell* dissented from it. Independently of the weight of authority, my own opinion is entirely with that of the majority of the Court, for these reasons: If the Defendant allows the new windows to remain unobstructed until the expiration of twenty years, the Plaintiff will acquire an absolute right to deprive him, the Defendant, of his inherent privilege of dealing as he pleases with his own property. It would be a serious interference with the rights of property, to give to the Plaintiff a valuable easement, which must necessarily prevent the Defendant from using his land [in the way in which he would otherwise be entitled to use it. I do not deny the force of Mr. *Eddis'* argument to a certain extent: He says correctly, that the right to open windows cannot be disputed on the ground of its interference with the privacy of a neighbour; and then draws the inference (as the dissentient judges did in *Jones v. Tapling*), that, to prevent an adjoining proprietor from building by establishing a prescriptive right to several windows is no greater interference than if he were equally prevented by the opening of one.

But though the law does not recognise the interference with privacy as a ground of relief, it does allow to the adjoining proprietor the right of building on his own land so as to prevent a presumptive title to light and air being acquired against him, a title which would deprive him of a valuable portion of his right of property—that of building on his own land as he pleases. With the greatest respect for those learned judges who took the view on which Mr. *Eddis* has relied, I confess it appears to me contrary to reason and common justice to say, that if I allow a neighbour to open and establish a right to one window, I am by that single concession precluded from interfering with an unlimited series of new windows which he may afterwards think fit to open, because I find it impossible to obstruct the new lights without in some measure interfering with the right to one light which I in the first instance allowed him to acquire.

So to hold would be in effect to entitle any person, under the pretence of wanting permission for one window only, to obtain the privilege of restricting to any extent his neighbour's right of obstructing any new windows which he may choose to open. If you make no opposition to a proposal to open one light, you are therefore, according to this argument, to be bound to consent to the opening of any number whatever, and this even though the privilege should have been acquired by the fraudulent device of opening one small and unobjectionable window with the secret purpose of thereby establishing a right to add an indefinite number at a future time.

I cannot conceive anything more unjust than the operation of such a rule of law would be, whether you regard the interference with privacy or not. And on this point it is always to be remembered, that, although it may be true that no redress is given for a disturbance of privacy, the law does leave it in the power of the person injured to

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secure his privacy, if he pleases, by the circuitous process of building a wall to obstruct the obnoxious window.

The answer to the contention, that the first concession of a single window precludes any subsequent interference, becomes more conclusive when the consequences are followed out. A consent might be obtained to the opening of a single window. After that, if the proprietor who had conceded the right desired to build, and to buy out the easement which had been acquired against him, he would be met with the demand that he must buy up not merely the right to a single window, but to an indefinite number of windows looking in the same direction. Such a contention as that could not be tolerated. An attempt to engraft in this way upon the concession of a single light the right to open any number of other lights, would be a fraud, which, I apprehend, no Court of law could support. A somewhat analogous case would be this:—suppose a person to obtain from his neighbour a right of way to his house and premises, and after having acquired that easement to open a back door, and to let all the public in, and convert the private road into a public thoroughfare. If that were attempted, the grantor of the right of way would have an unquestionable right to interfere; and in principle the present case is exactly analogous. I think, therefore, there is the strongest ground, independent of authority, for adhering to the rule settled in *Renshaw v. Bean*; and having come to the conclusion of fact that the new windows cannot be obstructed without obstructing the old ones, I hold that the Defendant is entitled to build according to his proposed plan.

That being so, this difficulty arises upon the frame of the Bill. The Bill alleges a right at law to all the windows. When the facts were sifted before a jury, it appeared that by reason of some of the lights not being ancient, the Plaintiff was not entitled to any relief whatever at law. It would seem, therefore, to follow, that the Bill ought to

be dismissed with costs. But then, at the bar it was said, on the part of the Plaintiff, after his claim as to some of the windows has been disproved, that he is willing to undertake to restore them to their old position, upon doing which he would be entitled to restrain the Defendant's building operations; and it was not disputed, on the part of the Defendant, that the Plaintiff would have the right to do this. But it was insisted that the right could not be conceded in the present suit, except as an indulgence, and upon condition that the Plaintiff should pay the costs, he having failed altogether in establishing the case for relief, upon which alone his Bill was founded. In answer to this it is replied, that each party has succeeded to some extent on the facts; and that if the Plaintiff claimed too much, the Defendant did not concede what the Plaintiff was really entitled to. The Plaintiff, however, ought to have known his own case. If he had stated the facts correctly in the Bill, it is very possible that the Defendant might have submitted to the limited claim. It is true, that the Defendant disputed the antiquity of the windows which have been proved to be ancient, as well as that of the rest: but it by no means follows that the Plaintiff's right would have been resisted if it had been put forward independently of the unfounded claim, and if the Defendant had had an opportunity of coming to terms by submitting to all that the Plaintiff could properly demand. Considering, therefore, that the strict right of the Defendant would be, to have the Bill dismissed with costs, but for the Plaintiff's offer to restore the lights to their old position, I cannot, by reason of the offer which he now makes, relieve him from paying the costs of the suit. The issues were found partly for the Plaintiff and partly for the Defendant, and there will therefore be no costs of the trial of those issues.

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There was another contest (evidently not the main dis-

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pute) as to a slight encroachment on the Plaintiff's land, which the Defendant in his answer admits, and offers to rectify, and it would seem has subsequently rectified. It is scarcely necessary to deal with that in the order.

Minutes.

DECLARE that the Plaintiff is entitled, as against the Defendant, to prevent any obstruction to the free access of air and light to the two ancient windows [specifying them], but that he is not entitled as against the Defendant to prevent the Defendant from obstructing by any buildings on his own property the access of light and air to the other windows in the Bill mentioned, found to be new or to have been altered in position. And it appearing to the Court that the Defendant cannot erect any building for obstructing the access of light and air to the last-mentioned windows without at the same time obstructing the access of light and air to the ancient windows, and the Court being therefore of opinion that the Plaintiff was not entitled to any relief in respect of any threatened obstruction by the Defendant to the access of light and air to such last-mentioned windows, except upon his submitting to such order as hereinafter contained; and the Plaintiff, rather than have his Bill dismissed, submitting to such order accordingly—This Court doth order, that the Plaintiff do, within two calendar months from the date of this order, block up or close permanently, against any access of light or air from Defendant's premises, the several windows as to which the Defendant is entitled to obstruct the access of light and air, but with liberty for the Plaintiff, as to the altered windows, to restore them to their original situation under the direction of the Judge. Plaintiff to pay the Defendant the costs of this suit, except so far as they have been increased by any question as to the encroachment, and not including the costs of the issue. And it is ordered that the Defendant be restrained from erecting any building whereby the access of light and air to the windows found to be ancient, or the altered windows when restored, may be impeded further or otherwise than such access of light and air was impeded by the said buildings pulled down by the Defendant. No costs as to encroachment or of the trial of the issues on either side. One moiety of the costs of the special jury to be paid by each side. Liberty to apply.

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THE original Bill in this case was a simple bill for foreclosure by the trustees of the settlement made upon the marriage of Mrs. *Younghusband* (formerly Mrs. *Neale*) against the persons representing the mortgagors.

The mortgage deed, which was dated 22nd September, 1853, purported to be a mortgage by *Samuel Cowne* and *George Henry Cowne* to Mrs. *Neale* of certain hereditaments, whereof *Samuel Cowne* was tenant for life in remainder expectant upon the decease and failure of issue of one *Nelthorpe*, and *George Henry Cowne* was tenant in tail in remainder expectant upon the determination of the life estate of *Samuel Cowne*.

The mortgage in question was in common form, and purported to secure the repayment of £1000 and interest, and it contained a covenant on the part of the mortgagors to effect a policy of insurance on the life of the survivor of *George Henry Cowne* and *Nelthorpe* for the sum of £1050, and to assign this policy to Mrs. *Neale* by way of collateral security.

Samuel Cowne had since become insolvent, and neither he nor his provisional assignee made any defence to this Bill. *George Henry Cowne* had, in the first place, mortgaged his interest to the Reversionary Interest Society, and afterwards sold his equity of redemption to one *Mortimore*. The Plaintiffs in the cross suit represented *Mortimore's* interest.

The cross Bill was filed for the purpose of setting aside immediately payable, whereas the contract was for an annuity, and the consideration was not to be payable till after the death of a person named, such mortgage is fraudulent and void as against a mortgagor who joined therein as surety only.

March 2nd,
3rd, & 18th.

*Mortgage—
Solicitor and
Client—Notice
—Principal
and Surety.*

When moneys, which form part of a larger sum placed by his client in the hands of a solicitor for purposes of investment, are lent by him on the security of a mortgage in which he has affected to act as principal, the client is bound by notice of all the circumstances which come within his (the solicitor's) knowledge.

Where in such a case the mortgage debt is afterwards settled upon trusts which are substantially for the benefit of the original mortgagor, the trustees have no higher rights than their cestui que trust had before the settlement.

Where a mortgage professes to be made in consideration of a sum down, and which is by the deed made im-

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the mortgage, so far as it affected *George Henry Cowne* and those claiming under him.

The material facts were as follows:—In the course of the month of April, 1853, *Mrs. Neale* intrusted one *Rymer*, then her solicitor, with a sum of £2500 for purposes of investment.

It was at first proposed that this sum should be invested on a mortgage, the particulars whereof had been communicated by *Rymer* to *Mrs. Neale*; but the negotiation for that mortgage had gone off.

Pending such negotiation, *Samuel Cowne* applied to *Rymer* to procure for him an annuity of £100 a-year, payable during *Nelthorpe's* life, and he represented that *Nelthorpe* was then a bachelor, aged seventy-one, and that his life was not worth more than five years purchase. As security for the payment of the consideration for this annuity he offered the reversionary interest of himself and his son in the premises in question.

The estimate of an actuary was taken, and he fixed the value of such an annuity at £780. *Rymer* then informed *Cowne* that he could not obtain what he wanted at such a price, but that he would himself sell the required annuity at the price of £1000, payable with interest within six months after *Nelthorpe's* death, and secured on the property aforesaid.

The proposed terms were agreed to by the *Cornes*, and thereupon *Rymer* wrote to *Mrs. Neale*, telling her that the proposed mortgage had proved too complicated for her purposes, and that he had lent £1000 (part of her £2500) to one *Mr. Jepson*, £1000 (further part thereof) to *Cowne*, and for the remaining £500 he recommended another investment.

Rymer then had two deeds prepared, which were duly executed, and by which this transaction was carried out. These deeds were both dated the 22nd September, 1853; and one of them was the mortgage deed in question. The other was a deed whereby *Rymer* covenanted to pay £100 per annum to *Samuel Cowne* during *Nelthorpe's* life.

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The evidence as to what passed at the time when these deeds were executed was conflicting.

George Henry Cowne said:—"When I came into the room, *Rymer* said to me, 'I suppose you know what this is about?' I said, 'Yes; you are going to allow my father £100 a-year till *Nelthorpe* dies.' He said, 'Yes,—sign this' and handed me a deed. I signed it. I believed it was merely a bond for the future payment of the price of the annuity; I never believed that I was mortgaging my reversionary interest. The deed was never read over or properly explained to me."

Rymer, on the contrary, said that he had truly explained the effect of both deeds to the *Cownes*, and that they had knowingly signed a receipt for £1000, and that he had expressly agreed himself to pay the interest during *Nelthorpe's* life.

In cross-examination, he said, that he had acted for both mortgagor and mortgagee; there were to be no costs charged; no money passed at the time; the £1000 was borrowed from *Mrs. Neale*, for the purpose of paying for the annuity; he immediately afterwards dealt with the money as his own; he could not say whether he had or not £1000 then to his credit at his bankers; he thought not just then.

Rymer continued to pay the annuity down to September, 1856, at which time he left this country and went to *Australia*. Some few payments had been made on account since that time, but nothing whatever had been paid since April, 1858; and it appeared that the annuity deed was void under the statute (a) for want of enrolment. *George*

(a) 53 Geo. 3, c. 141.

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Henry Cowne had joined in the transaction as surety merely, and no consideration whatever had at any time passed to him. By an indenture dated in November, 1853, (being the settlement made upon the marriage of Mrs. *Neale* with Mr. *Younghusband*,) the mortgage debt and mortgaged premises were (amongst other things) conveyed to the Plaintiffs in the first suit, upon certain trusts for the exclusive benefit of Mrs. *Neale* and her representatives.

Argument.
 ———

Mr. *Nugent*, (with him Mr. *Rolt*, Q.C.) for the Plaintiffs in the first suit :—

This is an ordinary foreclosure suit, and so far as the Defendants, the assignees of *Samuel Cowne*, are concerned, the decree is of course ; they have not filed a cross Bill, and cannot impeach the security.

The Defendants who represent *George Henry Cowne's* interest, or some of them, have filed a cross Bill to impeach the security, so far as it affects *G. H. Cowne's* reversion. Your Honour will judge of their case when you hear it.

Mr. *Giffard*, Q.C., and Mr. *E. R. Turner*, for the Plaintiffs in the cross suit :—

The transaction to which *George Henry Cowne* consented to become a party, was a purchase (as one transaction) of an annuity of £100 per annum at the price of £1000 ; and the deeds whereby that arrangement was to be carried out were a mere matter of detail, and were entirely intrusted to *Rymer*. The Plaintiffs will rely on *Kennedy v. Green* (a); but *Rymer* had Mrs. *Neale's* money in his hands for general investment, not on any particular trust ; and therefore he was her agent in this transaction, and she had sufficient constructive notice thereof, so that the doctrine of *Kennedy v. Green* (a) does not apply. Mrs. *Kennedy* was not there adopting anything that *Bostock* had done ; but here Mrs. *Younghusband* cannot claim anything except

(a) 3 M. & K. 699.

through *Rymer*, and she cannot adopt his act in part, and repudiate it in part. Besides, this was properly a post obit transaction, whereas the deed makes the money payable instantly.

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[The VICE-CHANCELLOR.—On the face of the mortgage deed, all that takes place is a mere charge on the reversion ; that is not a dealing with post obits.]

Mr. *Turner*.—Till *Nelthorpe's* death, there was not to be any right of foreclosure.

The Plaintiff's remedy is merely by action-at-law against *Rymer*.

If there had been two solicitors employed, this transaction could never have been carried into effect.

[They also referred to *Jackson v. Rowe* (a), *Vorley v. Cooke* (b), *Wall v. Cockerell* (c).]

Sir *Hugh Cairns*, Q.C., and Mr. *Beavan*, for the Reversionary Interest Society ; as well as Mr. *Osborne*, Q.C., and Mr. *Law*, for the provisional assignee of *Samuel Cowne* —took no part in the argument.

Mr. *Nugent* for the Plaintiffs in the original suit and Mr. and Mrs. *Younghusband*, relied on the dicta of Lord *Cottenham* in *Railton v. Mathews* (d). *Rymer* always paid interest on this £1000 as coming from *Cowne* : this is therefore a case of fraud by a solicitor, who was as much their solicitor as ours, of which we had no notice.

At any rate the trustees, who are purchasers of this mortgage for valuable consideration, must be entitled to the full benefit of it.

(a) 2 S. & S. 472.

(b) 1 Giff. 230.

(c) 11 W. R. 442.

(d) 10 Cl. & Fin. 934 : see p. 941.

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Mr. *Turner* in reply.—*Rymer* is not to be believed on his oath ; and setting aside his evidence, there is no shadow of ground for the defence.

[The VICE-CHANCELLOR referred to *Eyre v. Burmester* (a).]

Mr. *Turner*.—In that case no question of notice arose ; no title had been obtained.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The first of these Bills is a simple suit by the trustees of the marriage settlement of Mrs. *Younghusband*, to enforce a mortgage, whereby the repayment to her (under the former name of Mrs. *Neale*) of a sum of £1000 and interest is secured upon the reversionary interest of *Samuel Cowne* and *George Henry Cowne* in certain hereditaments. The mortgage is in common form, with a covenant to insure the life of the mortgagor against that of the prior tenant for life ; and on this Bill there is shown a simple straightforward case for foreclosure or redemption in the usual way. The Plaintiffs in the cross suit are derivative assignees of *George Henry Cowne*, through a person named *Mortimore*, who has become bankrupt. Their case is, that, although the deed purports to be a simple mortgage to Mrs. *Neale*, it was not made as a mortgage, nor was it ever intended to be a mortgage ; and they rely on *Samuel Cowne's* statement in support of that view. That statement is to this effect :—I wished to purchase an annuity to last during the life of the prior tenant for life. I applied to *Rymer* for the purpose, and told him that I thought my son would join me in securing the payment of the consideration money by way of mortgage, the money to be paid at the death of the tenant for life. *Rymer* sent me to an actuary to inquire the value of the annuity ; I brought him back an

(a) 10 H. L. Cas. 90.

estimate for £780; and he then said he would not do it at that price, but that he would do it for £1000; and I thereupon agreed to mortgage my reversionary interest for £1000, to be paid at the death of *Nelthorpe*, in consideration of an annuity of £100 a year to be paid to me during *Nelthorpe's* life; and my son agreed to join in the transaction simply as a surety. It was not till after the whole matter had been concluded, that I found out for the first time that the deeds shewed a perfectly different transaction, and that I had executed a mortgage payable at once, with a covenant to assure against *Nelthorpe's* life, and a covenant to pay £1000 and interest to a Mrs. *Neale*, of whom I knew nothing: the carrying out of the security was entrusted to *Rymer*, and he neglected to get the deed enrolled.

The Plaintiffs in the first suit reply, that Mrs. *Neale* knew nothing of all this story; she entrusted her money to *Rymer* for investment, and had no notice of any dealings other than the mortgage. On that point I am clear that I must treat *Rymer's* knowledge as her knowledge; if she chose to put her money unreservedly in his hands, she must of course be bound by his acts as her agent.

Then they say, we are purchasers for value as trustees of this settlement, and we certainly had no notice of any kind, actual or constructive. That is, however, displaced by the fact that the settlement is entirely for Mrs. *Younghusband's* benefit, and therefore her trustees cannot stand any higher than she does herself.

Even before I heard the reply, it appeared to me that Mrs. *Younghusband* must stand in the same position as *Rymer*. It is not as if *Rymer* had made a fraudulent statement to her of a mortgage either non-existent or not in accordance with his representation, and then, on the strength of that representation, had persuaded Mrs. *Younghusband* to advance her money; in such a case as that it

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might be argued that the particular circumstances negatived the presumption arising from the agency: but in this case he was not her agent for the purpose of investing a sum of money on any particular mortgage which was carried out, but he had a large sum of her money in his hands, under the circumstances which appear from the letter in which he tells her that the projected mortgage had gone off. Then, having the money under such circumstances, he lays out a part of it as described:—I gather from the evidence that he had really spent this money himself, and had not on this occasion power to draw £1000, so that this has more or less the aspect of an attempt at replacing, as best he could, money of which he had already spent all or the greater part. In this state of things it seems clear that he was her agent in this transaction, and that she is affected by anything which affected her agent. This case is very like that of *Wall v. Cockerell* (a), in the House of Lords; and I think that the observations of the Lord Chancellor, in moving the judgment of the House, are entirely applicable to the present case. He says:—“The appellant swears that he knew nothing of the mortgage deeds, and that he must have executed them on the representation of Messrs. *Hall* that they were instruments of a different nature.” And again, “On the question of payment the case is exceedingly plain and simple. No payment of the £5000 can be pretended to have been actually made by the respondents, except the payment of the £15000 on the 4th of February, which was a deposit by them in the hands of their own agents, Messrs. *Hall*, for the purpose of being invested on proper securities. The £5000 was misapplied by their own agents, who were entrusted with it long before the appellant’s securities were executed; and it is not pretended that one shilling of the £5000 was subsequently paid or applied by the Messrs.

(a) *H. W. R.* 442. 10 *Meq. C. C.* 229-

Hall unto or for the use of the appellant. If the respondents were in a condition to prove that they had ever paid any sum of money to the Messrs. *Hall* for the use of the appellant, or (as already observed) that the Messrs. *Hall* had applied any part of the respondents' money for the benefit of the appellant, the respondents would be so far entitled to retain the benefit of the mortgage. But these are the particulars in which their case is wanting. When the mortgage deeds were handed over to the respondents, they paid nothing on the faith and credit of the appellant's receipts, but took the deeds, trusting to the representations of the Messrs. *Hall*, to whom they had confided their money, and by whom that money had been spent before these mortgages were thought of. And they now want to convert this payment to the Messrs. *Hall* as their own agents into a payment to them as the agents of the appellant."

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So here, if it could be shewn that £1000, or any part of it, had been paid to *Cowne*, the matter might be different; but you cannot rely on the mere admission in the deed, that he had the money; nor on the receipt which is indorsed on it in common form, when we have this direct evidence as to the real transaction. The *Cownes* both say, we thought we were dealing to secure *Rymer* the sum of £1000, payable at the death of *Nelthorpe*, and we trusted him entirely as to the details of the manner in which this intention was to be carried out. He gave us a deed, in which he agreed to pay me, *Samuel Cowne*, an annuity of £100, according to the agreement; but the second deed, the one which he took from us, was not what we considered it was to be.

Rymer's evidence only comes to this:—It was agreed that I should raise £1000 to pay for the annuity; and they agreed to secure the repayment by mortgage, with a counter agreement that it was not to be paid for five years, which was calculated as the probable duration of the life of the

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first tenant for life, and I agreed to pay the interest in the meantime. He says nothing about the insurance, and he does not say expressly that he told the *Cownes* that Mrs. *Neale* was going to advance the money; but he does say, that he explained the deed to them, and that they understood that it was a mortgage. Probably they did; but not such a mortgage as they had agreed on, not a deed in which they were made to covenant to pay the principal at once, and not a deed in favour of a third party who was an entire stranger to them. If *Rymer* were the mortgagee and the consideration failed, the mortgage would also fail; and therefore the mortgagees are or might be placed in a very different position by having Mrs. *Neale* instead of *Rymer* for their mortgagee. On these grounds I am of opinion that this transaction cannot stand, as against *George Henry Cowne*. *Samuel Cowne* has not filed any cross bill, and the relief as to him is therefore matter of course:

If I could have assisted Mrs. *Younghusband* to the extent to which it appears that the annuity was actually paid, I would have done so; but I feel that I cannot do this. I do not go the length of saying that it would be impossible to find a case in which the Court would interfere to set right, as against a surety, a transaction not accurately carried out: such cases might readily be imagined, as for instance, if there had been an agreement to be surety to the extent of £1000 and the deed was for £2000; but that is not the sort of inaccuracy with which I have to deal here. This is a much stronger case than *Evans v. Bremridge* (a), in which I was obliged to set aside the security in toto, on the ground that, had the Plaintiff known that he was to be the only surety, he might have declined to execute the deed; so here, had *George Henry Cowne* known the whole transaction, with all the facts, he would have been entitled to say, "This is not what I contemplated, I will not enter into this."

(a) 2 K. & J. 174; S. C., 8 D. M. G. 100.

The Reversionary Interest Society must have the costs of the original suit, which, as against them, has wholly failed; but I cannot give them any costs of the cross suit, in which they are in the same interest as the Plaintiffs. Those Plaintiffs have been very careless, and *Cowne* has had upwards of £200 of Mrs. *Young*'s husband's money; I do not think that they are entitled to any costs.

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ONE decree in both suits. Dismiss the Bill of *Spaight v. Cowne* as against *Mortimore's* assignees and all the Defendants who claim under *George Henry Cowne*, with costs. Declare the mortgage security void as against *George Henry Cowne* and those claiming under him. Direct the Plaintiffs in that suit to convey the legal estate in *George Henry Cowne's* reversion to the Defendants the Directors of the Reversionary Interest Society; such Defendants to have their costs in that suit against the Plaintiffs, but not their costs in *Edwards v. Spaight*, which they must add to their security. No other order as to costs. Then take the usual decree for account and foreclosure as against *Samuel Cowne* and his judgment creditors.

Minute of
Decree.

EARL OF SUFFOLK v. LEWIS.

THIS was a demurrer. The material statements of the Bill were as follows:—

On the 31st of December, 1860, a notice to treat under the Defence Act, 1860, was served on Lord *Sherborne*, on behalf of the Secretary of State for War, in respect of certain lands of which Lord *Sherborne* was tenant for life, and which were required to be taken absolutely under the said Act.

On the 21st June, 1861, a second notice to treat was

siderable interval, the agreed sum, with £30 for expenses, as provided by the Act, but without interest, was paid into the Bank:—*Held*, on demurrer, that the owner could not claim interest, and that the payment was sufficient.

March 4th.
Defence Act,
1860 (23 & 24
Vict. c. 112)—
Notice to treat
—Agreement
for Compensation
—Interest.

Notice was given under the Defence Act, 1860, requiring certain lands to be kept free from buildings; and an agreement was entered into, fixing the amount of the compensation. After a con-

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served on Lord *Sherborne* in respect of other lands, of which he was tenant for life, and which were required to be kept free from buildings under the said Act.

On the 6th of August, 1861, an agreement was entered into between Lord *Sherborne* and the Secretary of State for War, by which the compensation for both parcels was fixed at £10,100.

After the date of this agreement, the title was investigated; and on the 7th of May, 1862, the Secretary of State for War paid into the Bank the sum of £3500, as compensation for the lands subject to the restraint on building, together with the further sum of £30, required by the 21st section of the Act as an equivalent for expenses.

Lord *Sherborne* died on the 19th of October, 1862, and the Plaintiffs (his executors), claimed interest on the said sum of £3500, from the date of the agreement of the 6th of August, 1861, to the date of the payment into the Bank. No building operations had taken place on the land subsequent to the agreement, and the Secretary of State had not entered on the land after the notice in restraint of building. The claim for interest was rejected, and this Bill was filed against Sir *G. C. Lewis*, the Secretary of State for War, to enforce it.

The Defendant demurred for want of equity.

Sect. 20 of the Defence Act, 1860 (*a*), directs, that any compensation payable in respect of lands or any interest therein, taken from tenants for life and others having power to agree only under this Act and the Defence Act, 1842, shall be paid in the manner directed by sects. 25—30 of the Defence Act, 1842, as amended. [These sections provide for payment into the Bank of *England*.]

(*a*). 23 & 24 Vict.c. 112.

Sect. 21 directs, that where any compensation is required to be paid into the Bank, a sum of £30 shall be added as an equivalent for the expenses consequent on such payment; and upon such compensation with such additional sum (which shall be deemed part of such compensation,) being so paid, the Secretary of State for War shall be discharged from all liability in respect thereof.

Sect. 24 enacts, that the costs of the agreement and of the verification of title shall be paid by the Secretary of State.

Sects. 26—28 provide for the apportionment of rents in the case of lands taken.

Sect. 30 enacts, that from and after payment of the compensation for lands required to be taken, they shall be vested in the said Secretary of State on behalf of Her Majesty, discharged of all estates, rights, and interests whatsoever.

Sect. 31. gives the Secretary of State power to enter on all lands required to be taken, after the expiration of fourteen days from the notice.

Sect. 32 directs, that in case possession be taken of any lands before payment of the compensation for the same, interest shall be payable on the amount of such compensation, at the rate of £5 per cent. per annum, from the time of taking possession.

Sect. 34 enacts, that from and after the service of the notice as to lands required to be kept free from buildings, no building shall be erected thereon; and empowers the Secretary of State, at the expiration of fourteen days after the notice, to enter, grub up trees, and level and clear the same.

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Sir Roundell Palmer, S. G., and Mr. Wickens, for the Defendant:—

Argument.

The scheme of the Act is this: As to the lands taken ab-

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solutely, they are to vest on payment ; and if possession is taken before payment, interest is to be paid from the time of entry (the rents from the same time going to the Secretary of State, under the 26th section).

With respect to the easement lands (as those required to be kept free from buildings may be termed), there is no provision for payment of interest ; and though there is a limit of three years for the exercise of certain of the powers conferred, this has no application to the restraint of new buildings, or to the payment of compensation ; but we admit that if unreasonable delay takes place, the landowner would be entitled to redress,—but that would be in the shape of damages, and not of interest.

The case of *Regent's Canal Company v. Ware* (a) is not material, as it only decides that interest is payable under a Lands Clauses contract from possession ; but in the present case there has been no possession.

[They also cited *Page v. Newman* (b), *Foster v. Weston* (c).]

Sir *Hugh Cairns*, Q. C., and Mr. *Kay*, for the Bill :—

The case comes within the principle of *Regent's Canal Company v. Ware*. The Government buy an easement, which takes full effect fourteen days after the notice, and prevents all building on the land. Therefore, from that time, or at any rate from the date of the agreement giving the compensation, interest must be payable, possession of the easement being in fact enjoyed during the whole period. It is true that the interest clause in the Defence Act applies only to land taken ; but the purpose of that clause was merely to give £5 per cent., instead of £4 ; and the case of easement lands is governed by the ordinary rule of the

(a) 23 Beav. 575, 587.

(b) 9 B. & C. 378.

(c) 6 Bing. 709.

Court, allowing £4 per cent. from the time of taking possession.

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If the contention for the Defendant is right, the Secretary of State may give notice, agree on compensation, and enjoy the full benefit of the easement of keeping the land free from buildings for ever, without paying anything at all. That cannot be the true construction of the Act. It is said that the remedy in such a case would be damages and not interest; but what is interest except damages for delay in the payment of money? The rule of the Court is: that, after a vendor is ready to complete, he is entitled to interest at £4 per cent. for any subsequent delay in payment; and this rule is not altered by the Defence Act.

[They cited *Attorney-General v. Dean of Christchurch (a)*, *Duke of Norfolk v. Tennant (b)*.]

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The argument in support of the Bill is put in this shape : that, by a notice under the Act of Parliament, an immediate right is vested in the Secretary for War to have the land, the subject of the notice, kept free from buildings and other obstructions ; in addition to which a further power is given to enter for the purpose of pulling down buildings, and clearing and levelling the land. The whole argument turns upon the assumption, that the Secretary of State must be taken, from the moment when these rights vest in him, to be in the position of a purchaser who has entered into possession.

Judgment.

But having regard to the whole of the Act, I think it

(a) 13 Sim. 214.

(b) 9 Hare, 745.

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would be a confusion of terms to treat this as equivalent to taking immediate possession. The Act relates to two subjects—the one is compensation, in lieu of the damages which would be recoverable but for the Act by which the Secretary of State is authorised to commit certain injury on paying compensation in the manner which the statute provides. The other subject is compensation for property taken. The possession of property and the committal of injury are essentially different things. The fact that the statute authorises certain trespasses, does not alter the nature of the act done—it is still a trespass, though an authorised trespass. All that the Act does is, to ascertain the amount of the injury, and direct compensation for it. These considerations displace the argument which is based on the analogy of taking possession of purchased property. The difficulty was obviously felt by the Plaintiff's counsel when they attempted to fix the time of the supposed possession from which interest was to run. The claim should, on this principle, have been from the time of the notice, or fourteen days afterwards, when the restrictions on building and the right of entry take effect under the Act. But it has not been attempted to carry back the interest beyond the date of the contract; and the explanation offered is, that the intervening injury must be taken to be covered by the amount of compensation agreed upon. That only makes the real distinction between the acquisition of property and the privilege of committing injury more plain.

I agree with the argument, that the 32nd section of the Act does not exclude the right to interest in respect of the injured as distinguished from the taken lands; and that it may have been intended only to confer, in the cases to which it applies, a right to a higher rate of interest than the Court is in the habit of allowing. Still the clause does suggest the observation, that, when the Legislature was carefully providing for the rate of interest to be paid in one class of

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cases, it might have been expected that some provision should have been made for interest in respect of damaged lands, if such interest was meant to be payable. The Act is silent where there was a very good reason that it should give explicit directions if interest was to be payable in such cases; and this silence tends further to illustrate the distinction between the two classes of cases.

Strong hypothetical cases may no doubt be put. There might be building land on which houses were about to be erected, with the probability of bringing in large profits to the owner. The building might be stopped by a notice under the Act; a long time might elapse before payment, in consequence of difficulties in the title, or from other causes; and the owner might suffer substantial injury by the delay in the payment of the compensation. Another possible case may equally have occurred to the Legislature, that the land might be tolerably certain to remain in its actual condition, whether the restraint on building were imposed or not. In point of fact, the Legislature advisedly, as it seems to me, says nothing at all about the payment of interest in the case of compensation for trespass or for the restraint on the use of the land for building purposes, although it vests the right completely within fourteen days after the notice. It provides for interest on the purchase money of land, of which possession may be taken before payment; and makes no provision at all for the case where what has been called in argument possession is taken, before payment, of those easements of trespass and restraint of user, which are the occasion of the present contest.

The true answer to the argument for the Bill is, that the payment in this case is not the price of possession, but damages for injury. It was thrown out in argument, that the Secretary for War might derive the full benefit of his notice, and delay the payment as long as he pleased; and

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certainly that would be possible, but it would not be without remedy. It is quite clear, that, when all the preliminary steps have been taken, and the proper time for payment has arrived, the owner has nothing to do but to make a demand for the immediate payment of the ascertained amount, and this would entitle him to his remedy for any delay in payment. This observation displaces the supposed hardship upon the owner. I see no pretence for reading the agreement in this case as implying a contract to pay interest. The demurrer must therefore be allowed.

HODGSON v. EARL OF BECTIVE.

May 6th, 7th,
 & 29th.

*Will—Interim
 Income of real
 and personal
 Estate during
 Suspense of
 Limitations.*

Devise of *K.*
 and *M.* estates
 to *A.* for life,
 remainder to
 trustees in trust
 for *B.* for life,
 with limita-
 tions over for

B.'s younger sons and their male issue, remainder to *B.*'s eldest son *K.* for life, remainder to his sons in tail male, with remainders over. Directions for maintenance and accumulation of rents during the minority of any tenant for life or in tail by purchase.

Gift of the residue of the real estates and all chattels real to the same trustees upon the limitations of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*

Bequest of the residuary personal estate to the same trustees, upon trust, until conversion, to invest and apply the income on the trusts after declared of the rents of the real estate to be purchased, and upon trust, at the discretion of the trustees, to invest two-thirds of the personal residue in the purchase of land, to be settled on the trusts of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*, and to invest the remaining third thereof in land to be settled to the use of *K.* for life, remainder to his sons successively in tail male, remainder on the trusts declared of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*, with provisions for maintenance and accumulation during the minority of any tenant for life or tenant in tail in possession. Appointment of the said trustees executors of the will.

A. being dead, and *B.* being alive:—*Held*, that the rents of the residuary real estate, until the same should vest in some person entitled in possession under the will, went to the heir at law.

Held also, that the disposition of the chattels real, and of the residuary personal estate, carried with it the interim income during the suspense of vesting.

cified; and after her decease, or other determination of the said estate, to the use of the sons born in testator's lifetime of Lady *Bective* (except Lord *Kenlis*, the first and only present son, or the eldest son for the time being, of Lord *Bective*, being heir or heir apparent of the Earl of *Bective*) successively for life, and in strict settlement on their male issue, remainder to the use of the sons of Lady *Bective* born after the testator's death (except an eldest son being heir or heir apparent of the Earl of *Bective*) successively in tail male. And in default of such issue, to the use of Lord *Kenlis* for life, remainder to his sons successively in tail male, remainder to Lord *Kenlis* in tail general, with remainders in favour of the second and other sons, and the first and other daughters of Lord *Bective* in tail general, with remainder over in favour of the testator's brother, and an ultimate remainder to testator's own right heirs. Then followed a clause shifting the use declared in favour of any son, or the issue of any son who should succeed to certain estates in *Cavan* in the life of any other son; and a direction to the trustees to receive the rents during the minority of any tenant for life or in tail by purchase, who would otherwise have been entitled in possession, and apply them for his maintenance, and accumulate the remainder, and hold the stocks, funds, and securities in which the same might be invested and the annual income thereof respectively, upon the like trusts as thereafter declared of the proceeds of sales under the power of sale and exchange thereafter contained, which were to lay the same out in the purchase of lands to be held upon the trusts declared of the said devised estates; and after a bequest of an annuity of £1000 a year for the separate use of the Countess of *Bective*, the will proceeded as follows:—

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“And as to, for, and concerning all the rest and residue of my real estate, and all my chattels real whatsoever and wheresoever not hereinbefore devised or bequeathed, I give,

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devise, and bequeath the same unto the before-mentioned trustees, their heirs, executors, and administrators. Nevertheless to, for, and upon the uses, trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, directions, and declarations hereinbefore limited, expressed, directed, and declared to take effect from and after the decease of my said wife and my said daughter the Countess of *Bective*, or the sooner determination of the said estate so limited in use to my trustees during the life of the Countess as aforesaid, of and concerning my said hereditaments and estates hereinbefore devised, situate in the said townships of *Kirkby Lonsdale* and *Mansergh*, but so, nevertheless, as not to increase or multiply charges under the powers of jointuring or charging with portions. Provided always that no person who shall take an estate tail by purchase in any chattels real respectively hereinbefore devised or bequeathed, shall be entitled to the absolute property therein respectively, unless and until he or she shall attain the age of twenty-one years, or, dying under that age, unless he or she shall leave issue of his or her body inheritable to such entail living at his or her decease, or born in due time afterwards. And as to, for, and concerning all the rest and residue of my personal estate and effects whatsoever and wheresoever, subject to the payment of my debts and funeral and testamentary expenses, and the expenses of proving this my will, and to the payment of my legacies and annuities hereinbefore bequeathed, I give and bequeath the same unto the said trustees, their executors, administrators, and assigns, in trust that they the said trustees, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, shall, with all convenient speed after my decease, sell and convert into money all such parts of my said residuary personal estate and effects as shall not at my decease consist of money, or of money in the public stocks or funds of *Great Britain*,

or at interest on Government or real securities, or invested in railway shares, or in the joint stock or in the shares of any incorporated body, and shall in the meantime, until my said residuary personal estate, or the proceeds thereof, shall be invested in the purchase of real estate or real estates as hereinafter directed, of their or his proper authority and discretion, lay out and invest the moneys to arise by such sale and conversion in the names or name of my said trustees or trustee for the time being in some or one of the public stocks or funds of *Great Britain*, or at interest upon Government or real securities in *England* or *Wales*, and shall, of such proper authority and discretion as aforesaid, from time to time alter, vary, and transpose, as well the said stocks, funds, and securities to be so acquired as last mentioned, as also all other the stocks, funds, securities, and investments, of which any part or parts of the said residue of my personal estate shall at my decease or from time to time consist, in, for, or upon stocks, funds or securities of the same or the like nature, and shall pay and apply the interest, dividends, and annual produce of the said residue of my personal estate, stocks, funds, and securities upon and for such trusts, intents, and purposes, and in such manner as the rents and profits of the real estates, in the purchase of which the said residue of my personal estate is hereinafter directed to be invested, would be payable and applicable in case such investment should have been actually made. And I direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall, at such times or time as they or he shall, in their or his discretion, think proper, and of their or his own proper authority lay out and invest two equal third parts of the said residue of my said personal estate, stocks, funds, and securities, or the proceeds thereof, in the purchase of freehold or copyhold hereditaments of inheritance free from incumbrances, to be situate in any county or counties of *England* or *Wales* (the counties of *Westmoreland*, and

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North Lancashire, and West Riding of the County of York being preferred, but without fettering or controlling the discretion of the said trustees or trustee as aforesaid), and shall settle the same, or cause the same to be settled to, for, and upon the same uses, trusts, intents, and purposes, and with, under, and subject to the same powers, provisoes, directions, and declarations as are hereinbefore limited, expressed, directed, and declared to take effect from and after the decease of my said wife and of my said daughter *Amelia* Countess of *Bective*, or the sooner determination of the said estate so limited to the said trustees during her life as aforesaid, of and concerning the said hereditaments and estates hereinbefore devised, situate in the parish of *Kirkby Lonsdale* and *Mansergh*, but so as not to increase or multiply charges under the powers of jointuring or charging with portions. And I direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall at such time or times as they or he shall in their discretion think proper, and of their or his own proper authority, lay out and invest the remaining third part of the said residue of my personal estate, stocks, funds, and securities, or of the proceeds thereof, in the purchase of freehold or copyhold hereditaments of inheritance, free from incumbrances, to be situate in any county or counties of *England* or *Wales* (the counties of *Westmoreland*, and the *West Riding* of the County of *York*, and the *Northern Division* of the County Palatine of *Lancaster* being preferred, but without fettering or controlling the discretion of my said trustees or trustee for the time being), and shall settle the same hereditaments, or cause the same to be settled, to the use of *Thomas Lord Kenlis*, the said first son of my said daughter the Defendant *Amelia* Countess of *Bective*, and his assigns for his life, without impeachment of waste, with an immediate remainder to his first and other sons successively in tail male; and after the failure or

determination of the said uses and estates, then, to, for, and upon the same uses, trusts, intents and purposes, and with, under, and subject to the same powers, provisoes, directions, and declarations hereinbefore limited and expressed, directed, and declared to take effect from and after the decease of my said wife and of my said daughter *Amelia* Countess of *Bective*, or the sooner determination of the said estate so limited to the said trustees during her life as aforesaid, of and concerning the said hereditaments and estates hereinbefore devised, situate in the parish of *Kirkby Lonsdale* and *Mansergh*, but so as not to increase or multiply charges under the powers of jointuring or charging with portions; and in which said settlement to be so made shall be inserted a proviso for determining the said estate for life so directed to be limited in use to the Defendant Lord *Kenlis* and his assigns as if he were dead, and for determining the said estate tail to be so limited to his first and other sons as if such tenant in tail were dead without issue inheritable to the said entail, in case the said Lord *Kenlis* or any issue male of him should become entitled to the possession or to the receipt of the rents and profits of the hereditaments in which the said two third parts of the said residue of my said personal estate are so as hereinbefore directed to be invested as aforesaid, by virtue of the limitation so hereinbefore directed to be in such settlement thereof inserted or contained as aforesaid, and also usual powers of leasing, sale or exchange, and also provisions for the maintenance of every minor tenant for life and tenant in tail in possession, and for accumulating his surplus income during his minority, and applying such accumulations in the same manner as money to be produced by the exercise of the power of sale to be contained in the said settlement, and also usual clauses for enabling the trustees or trustee for the time being to give good receipts and discharges, and for appointing new trustees, and for the indemnity of the

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trustees and all such usual clauses as the said trustees or trustee for the time being, or their or his counsel, shall think proper or advise."

And the testator appointed the said trustees executors of his will.

The testator made a codicil to his said will, dated the 18th of January, 1854, whereby he gave and devised an estate called the *Pamacre and Bond's Estate*, situate in the County of *Lancaster*, for the purchase of which he had entered into a contract (since completed) unto the same trustees, their heirs and assigns, nevertheless to, for, and upon the uses, trusts, intents and purposes, and with, under, and subject to the powers, provisoes, directions, and declarations in his said will limited, expressed, directed, and declared to take effect from and after the decease of his said wife and his daughter, the Defendant the Countess of *Bective*, or the sooner determination of the estate in his will limited in use to his said trustees during the life of his daughter, of and concerning the hereditaments and estates in his said will devised, situate in the townships of *Kirkby Lonsdale* and *Mansergh*; but so nevertheless as not to increase or multiply charges under the powers of jointuring or charging with portions in the will contained.

The testator, *William Thompson*, died on the 10th of March, 1854.

The Countess of *Bective* was the only child and sole heiress at law of the testator at the time of his death. The testator's widow, *Amelia Thompson*, named in his will, and the Defendant the Countess, or her husband in her right, were the only persons entitled to share any personal estate of the testator undisposed of by his will or codicil.

The testator's widow died on the 7th of September, 1861,

having by her will, dated the 24th of July, 1856, and duly executed, appointed the Earl and Countess of *Bective* executor and executrix thereof, and the same was proved by the Earl.

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The Countess of *Bective* had one son only at the date of the testator's will and at the time of his death ; that is to say, the Defendant Lord *Kenlis*, who was also the only son and heir apparent of the Earl of *Bective*, and was born on the 11th of February, 1844, and had never been married. The Countess had not had any son since that date. She had five daughters, four of whom were born in the testator's lifetime, and one since his death. The daughters were all infants and unmarried when the Bill was filed.

The residue of the testator's personal estate, after payment of his debts, legacies, and funeral and testamentary expenses, was of great value ; and the trustees and executors had from time to time converted into money parts of such personal estate, and invested the proceeds of such conversion in the purchase of real estates, the legal estate in which was now vested in them, but no settlement had yet been made. The greater part, however, of the testator's personal estate remained unconverted. The annual income of the residuary real and personal estate, of the real estate devised by the codicil, and of the purchased estates, had been received by the trustees, and part was paid to the Earl for the maintenance of Lord *Kenlis*, and the rest accumulated.

The Earl and Countess of *Bective* contended, that, until the birth of younger sons of the Countess, or if there should be no such son then during her life, or at any rate until the sooner determination of the estate limited in trust for her in the *Kirkby Lonsdale* and *Mansergh* estates, the annual income of the testator's residuary real estate

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and the estate devised by his codicil, and of the two thirds of his residuary personal estate, was undisposed of by his will. The Earl claimed in right of his wife to be entitled during such period to the income of the residuary real estate, and the estate devised by the codicil, and the accumulations thereof, respectively, since the testator's death. The Earl in the right of his said wife, and as the personal representative of the testator's widow, also claimed for the same period to be interested in the annual income of two-thirds of the residuary personal estate, and also of such of the purchased real estates as represented purchases out of or on account of such two-thirds, and the accumulations thereof respectively.

These claims were opposed on the part of Lord *Kenlis*, and the Bill was filed by the acting trustees to obtain the direction of the Court.

Argument.

Mr. *Wickens* for the Plaintiffs, the trustees.

Sir *Roundell Palmer*, S. G., Mr. *Hobhouse*, Q.C., and Mr. *F. V. Hawkins*, for the Earl and Countess of *Bective* :—

It is settled law, that if a testator makes a series of executory devises without any words disposing of the intermediate rents during the suspense of those interests, such intermediate rents are undisposed of and go to the heir at law. This point, among others, was clearly established by *Hopkins v. Hopkins*, and has never since been questioned ; and it makes no difference whether the subject of the gift is a specific or residuary estate. In point of fact, *Hopkins v. Hopkins* was a case of residuary estate. This appears from an extract from the decree made by Sir *J. Jekyll* on the 25th Oct. 1734. The decree, which we have obtained from the Registrar's Book, was in substance affirmed by Lord *Talbot* on the 18th Nov. 1735 (a). The

(a) Cas. t. Talb. 44.

points determined on that occasion were—first, that under a will similar in its frame to that in the present case, estates of persons in esse who claimed after limitations to persons not in esse created no interest in possession, but waited the determination of the prior estates : secondly, that the rents during the suspense went to the Plaintiff the heir-at-law ; thirdly, that the Plaintiff was also entitled to the interim income of personalty directed to be invested in land, and to be held on the same uses as the realty. The case is reported at some length in a note to *Hargrave's* edition of *Coke upon Littleton* (a). The third point decided, if it went upon the ground which has been displaced by *Ackroyd v. Smithson*, is no longer law ; but the authority of *Hopkins v. Hopkins* is wholly untouched on the other points. The case came on again before Lord *Hardwicke*, in 1739, after the birth of a child (b), and the contention there was, that the executory devises were turned into contingent remainders, and that they had been destroyed by the death of the first taker ; but it was held that the legal estate of the trustees supported them.

The case is clearly an authority for our contention in respect of the realty.

[They also cited on the same point *Duffield v. Duffield* (c), *Wills v. Wills* (d), *Bullock v. Stones* (e).

Unless, therefore, some contrary direction is to be found in the will, the interim rents go to the heir-at-law. There is no such indication, but everything points the other way.

It will be said, that the testator has made a mixed fund, and that the rule as to personal income carries with it the rents, on the principle of *Genery v. Fitzgerald* (f), *Gibson v. Montford* (g), *Stephens v. Stephens* (h).

(a) Co. Litt. 271. b. note vii. 2.

(b) 1 Atk. 581.

(c) 3 Bligh, N. S., 260.

(d) 1 Dr. & War. 439.

(e) 2 Ves. Sen. 521.

(f) Jac. 468.

(g) 1 Ves. Sen. 485.

(h) Cas. t. Talb. 228.

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This class of cases turns upon the fact of there being, first, a specific devise, and then a residuary, real and personal devise and bequest, the grounds being the blending of the real and personal estate; and in *Gibson v. Montford*, the direction, that, on the death of an annuitant, the fund was to go back to the persons entitled in remainder.

The present case is not one of blending, certainly not one where the real estate is directed to go according to the rule which governs personalty. On the contrary—the personal estate is given by reference to the realty; and the same principle on which in *Genery v. Fitzgerald* the rule as to personalty was held to attract the interim rents of the realty applies e converso, so that the rule as to realty attracts the personal income, and that also must be regarded as undisposed of.

Further, the direction as to the personalty is, that it shall be divided into thirds two-thirds to go one way, and one-third another. If it be said that the gift of the corpus carries the intermediate income, as no doubt it would do in the case of a simple absolute gift of personalty at a future time, as decided in *Green v. Ekins* (a), it is clear that it can only carry it as income and not as corpus; and under the series of limitations found in this will, there is no one entitled to income during this period; and therefore we are forced back to the conclusion, that the interim income of the personalty no less than of the realty is undisposed of.

[They also cited *Skrymsher v. Northcote* (b), and *Humble v. Shore* (c).]

Sir Hugh Cairns, Q. C., Mr. Giffard, Q. C., and Mr. Erskine, for Lord *enlis* :—

(a) 2 Atk. 473.

(b) 1 Swanst. 566.

(c) 7 Hare, 247.

As to the personal estate: *Green v. Elkins* exhausts the whole distinction between realty and personalty, and settles that a future gift of personalty carries with it the interim income. *Hopkins v. Hopkins* has been much relied on; but in truth, though a leading case on a totally different point, it is an entirely unknown case on the question which is now raised. Considering that the decision carried both the real and personal income to the heir, and is confessedly wrong as to part, the authority is scarcely of that conclusive kind which it has been represented to be. The law on the point now under consideration was not then settled, and we must look to subsequent cases for guidance.

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The principle of the old cases was, that, until a devise vested, the legal estate was in the heir, and entitled him to the rents. Then *Genery v. Fitzgerald* adds the doctrine, that, when the realty and personalty are blended, the rule as to personalty shall prevail; and in such a case it makes no difference whether the residue is given wholly to one, or split into shares. In *Skrymsher v. Northcote*, the principle was applied to an aliquot share of the residue which had lapsed. Nor does it affect the question that the personalty, instead of being given absolutely, is settled. If the executors had invested it there would have been a resulting use of the interim rents to them as executors, and as part of the personal estate, and that part with all the rest would be included, according to the general rule, in a gift of the personal residue: *Head v. Godlee* (a).

It is said that this is the converse of *Genery v. Fitzgerald*, and that the realty attracts the personalty. There is no authority for such a position; and *Genery v. Fitzgerald* was not decided on any such notion of attraction, but on this, that the blending of realty and personalty enabled the Court to give effect to the intention to pass everything

(a) Johns. 536, 582.

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(interim income included), although the traditional favor shewn to the heir would defeat the intention in the case of realty alone. It is idle, therefore, to say, that *Genery v. Fitzgerald* helps the case of the next of kin at all. On the contrary, it is an express authority for us, carrying the interim rents with the interim income of the personalty.

Suppose the testator gives all his personal estate to his first son, who attains twenty-one, and then, by a subsequent clause, gives all his realty to the same person; the effect is precisely the same as if the real and personal estate were given in a single clause; and the rule established in *Genery v. Fitzgerald*, carrying the whole interim income, both of realty and personalty to the first taker must equally apply. Then if the disposition of realty and personalty being by two clauses instead of one makes no difference, neither can it make any difference that the one or the other clause comes first in the will. The principle is, that where the whole realty and personalty, or the residuary realty and personalty, or any aliquot parts of them respectively, are to go on the same limitations, the whole interim income is included in the gift of the residuary or of the whole estate, as the case may be. *Ackers v. Phipps* (a) further illustrates this position; moreover, this is an executory trust, which the Court, if need be, will mould so as to carry out the intention.

[They also cited *Forth v. Chapman* (b), and *Turton v. Lambarde* (c).]

The VICE CHANCELLOR called for a reply only as to the personal estate.

Sir *Roundell Palmer* in reply :

The argument on the other side assumes the rule of

(a) 8 Cl. & F. 665.

(b) 1 P. Wms. 663.

(c) 1 D. F. & J. 495.

law to be, that the gift of personal estate at a future time necessarily carries with it the interim income. But this is too large a way of stating the rule. When the estate is given to trustees, and part of the beneficial interest is undisposed of, that is held on trust for the next of kin. All the cases relied on are where the corpus is given *uno flatu* to one person, not to cases where it is vested in trustees upon trust for successive takers. If all the residuary personal estate is given absolutely to A., I admit that it carries with it the interim income not otherwise disposed of. That was the case in *Green v. Ekins*, but it is not the present case. There is no difference in principle between the claim of the heir to a part of the realty, as to which no trusts are declared, and the claims of the next of kin to part of the personalty in the same position: *Underwood v. Wing (a)*.

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It is true that a gift of residue at a future time carries with it the intermediate income; but it is not true, that a gift of corpus, *eo nomine*, will do so. Here the gift over is of corpus, as distinguished from income.

Then it is said, that if the executors invested the personalty, there would be a resulting trust to them as executors, and therefore as part of the personal estate; but the investment would be in the character not of executors, but of trustees, and the notion of a resulting trust to a trustee is unheard of. It would be not to the trustees, but to the persons entitled to undisposed of estate. As to this being an executory trust which the Court will mould, *Stanley v. Stanley (b)* is an authority in point the other way. Then it makes a great distinction, that the residue is not given in one lump, but one-third to one set of persons and two-thirds to another. If the gift carried the income undisposed of, it would carry it not exclusively to the two-thirds from which it arose, but to the whole residue. But

(a) 4 D. M. G. 633, 656.

(b) 16 Ves. 491.

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how can the fruits of the two-thirds be divided again into thirds? The contention, therefore, leads to an absurdity, from which the only escape is to hold that the rule of the residue carrying the interim income does not apply where the residue is divided into two portions settled on different limitations. The error is in assuming the rule to be that a gift of residue attracts to it the intermediate income. The true rule is, that the word residue comprehends all that is undisposed of, and so includes the income; but that has no application where the residue is dealt with as it is here.

Hopkins v. Hopkins is an express decision in our favour; and it is not clear that it proceeded on the erroneous notion which *Ackroyd v. Smithson* displaced, because, so far as appears, the heir-at-law may have been the sole next of kin, as he certainly was one of them.

May 27th.
 Judgment.

VICE CHANCELLOR SIR W. PAGE WOOD :—

A question involving property of very considerable amount has been raised in the discussion in this case. The contest relates to two portions of the property of the testator, the residuary real estate, and the residuary personal estate, or rather to two thirds of the residuary personal estate given by the same will; and the controversy, although it is one of considerable importance in point of amount, and was argued with great ability, appeared to me at the hearing (and I have seen no reason to change my opinion) to be entirely covered by authority on both the points which were raised in the discussion. The first question which occurs is this: The testator devises certain estates called his *Kirkby Lonsdale* and *Mansergh* estates, subject to a

life interest in his widow, who is since dead, to the trustees of his will on certain trusts conveying the legal estate to those trustees during the life of his daughter and only child, the Countess of *Bective*, upon trust for her, with a contingency for determining that estate. After the life estate of the Countess comes a series of limitations to the Countess's second and other sons, exclusive of the Defendant, her eldest son, Lord *Kenlis*, and in default of such issue to Lord *Kenlis* for life, with remainder to his issue. Lord *Kenlis* being alive, and Lady *Bective* being also alive and having at the present time no other son, those limitations which follow after the life interest would, if they stood alone, be of course executory devises. The residuary devise then is made in this form: "As to, for, and concerning all the rest and residue of my real estates, and all my chattels real whatsoever and wheresoever not hereinbefore devised or bequeathed, I give, devise, and bequeath the same unto the trustees, their heirs, executors, and administrators, nevertheless to, for, and upon the uses, trusts, intents, and purposes, and with, under, and subject to the powers, provisos, directions, and declarations hereinbefore limited, expressed, directed, and declared to take effect from and after the decease of my said wife and my said daughter *Amelia* Countess of *Bective*, or the sooner determination of the said estate so limited in use to my said trustees during the life of my said daughter as aforesaid, of and concerning my said hereditaments and estates hereinbefore devised situate in the said township of *Kirkby Lonsdale* and *Mansergh*; but so, nevertheless, as not to increase or multiply charges under the powers of jointuring or charging with portions." Therefore in effect you have as to all this residuary real estate a clear executory devise to the second and other sons, none of whom have yet come into esse; and any estate which Lord *Kenlis* may take must be expectant upon the time when that contingency

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will determine, and when it shall be ascertained what is the effect of this executory devise, there being in the interim no disposition in words of the rents and profits. Whether there is any disposition in point of construction is one of the questions which I have to consider ; but in words there is no disposition of the intermediate rents and profits pending the suspense of that executory devise.

Now, as regards this point, it appears to be quite settled by authority ever since the time of *Hopkins v. Hopkins*, that in the simple case of an executory devise, where nothing is said of rents and profits, the devise of the estate will not carry the intermediate rents and profits ; but that they are undisposed of, and go to the heir-at-law of the testator, who, in this case, is the Countess of *Bective*, the testator's only child. *Hopkins v. Hopkins* went to the full extent I may say of this case, because there the devise was not merely of certain specified estates, but, as appears from the note taken from the Registrar's Book, of all other the testator's estates and effects, being an entire and complete devise as much as if there had been a distinct gift of all his residuary real estates. In such a state of circumstances (recognised as that case has been from that time down to the case of *Duffield v. Duffield* in the House of Lords, and *Wills v. Wills* before Lord *St. Leonard's*, in *Ireland*, and standing, as it does, as a case of the highest authority), it is impossible to contend, that, in the absence of any words clearly leading to what the Court considers judicially to imply a gift of the intermediate rents and profits, any such gift can take effect or can be introduced into the testator's will. Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into esse when the executory devise has taken effect, nor all the persons who may be interested under the series of devises following that executory devise by way

of accumulation can establish their claim. They are all clearly excluded unless one can find that there is enough on the face of the will to lead to the inference that such a disposition of rents and profits was intended. I have every ingredient here that there was in *Hopkins v. Hopkins*. There is the fact of the accumulation being directed in certain instances, and not being directed during the period that the executory devise should be in suspense, and there is not, in truth, a shadow of distinction, as it appears to me throughout, to be drawn between *Hopkins v. Hopkins* and this case, unless in the circumstance that this is a devise of all the residue of the testator's real estates, and even that appears now from the Registrar's Book to be common to both cases.

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Now, as regards the question of intermediate rents and profits not directly dealt with by the will, there have been two classes of cases. The leading case in one class (in fact it involved both points, but it is the leading authority as regards the first,) was the case of *Stephens v. Stephens*, where it was held, that if you have first a series of executory devises,—which, according to *Hopkins v. Hopkins*, do not pass the intermediate rents, but leave them undisposed of,—and then that series of limitations is followed by a general residuary devise of all the testator's real estate; in cases of that description it was held that the undisposed of rents and profits mentioned in the first part of the will pass to those who take beneficially under the general residuary devise of all the testator's interest in his real estates. *Duffield v. Duffield* is another instance of the same kind; and so also is *Genery v. Fitzgerald*, though it is more frequently referred to as settling the doctrine which I am next about to state. Where you find a general gift of all a testator's real and personal estate as one fund, limited in one mass upon a series of limitations, commenced by an executory devise, there it was held in

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Genery v. Fitzgerald and other authorities, that inasmuch as the two funds are mixed together, and as the gift of the personal estate does carry in all cases the interim profits, this Court is at liberty to infer from the blending of the realty and personalty an intention (which it would not, against the heir, infer from the mere gift of the real estate,) that the whole should go in one course of devolution, and going in one course of devolution, that the intermediate rents of the real estate should pass in the same manner as the interest, dividends, and produce of the personal estate. The whole doctrine is so clearly laid down in *Genery v. Fitzgerald* in half a dozen sentences by Lord *Eldon*, that I can scarcely do better than simply refer to it. Mr. *Shadwell*, who was counsel in support of the appeal on behalf of the heir-at-law, put the case thus: Where there is an executory devise of real estate, and the intermediate rents and profits are not disposed of, they descend to the heir-at-law, the rule being different as to personalty. On the other hand, if, after an executory devise of a particular estate, there is a general residuary clause, it will carry the intermediate rents and profits of the lands first devised. The question, he says, here is as to the interim enjoyment when the residue is the subject of the executory devise. Lord *Eldon* says upon this: "The general principles are these: when personal estate is given to A. at twenty-one, that will carry the intermediate interest; if a testator gives his estate, *Blackacre*, at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not shew an intention that the same rule shall operate on both; here the property was partly real, partly personal, and partly of such a description, that the testator does not seem to have known whether it was real or personal. He does not, by his will, create any trust, but makes a legal devise and bequest of the

whole together ; then is not the weight of authority in favor of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together ? that, I apprehend, is the rule which has been clearly settled."

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Now there are some dicta of Lord *St. Leonard's*, in the case of *Wills v. Wills*, which, at first, would seem to lead to the conclusion, that the simple gift of the residuary real estate would carry intermediate rents and profits of that estate ; but when one looks at it a little more narrowly, I think that is not the meaning to be attributed to that learned judge. Speaking of *Gibson v. Lord Montfort*, (where the gift was of a mixed fund, and where there was a great deal of discussion and consideration, before Lord *Hardwicke* came finally to the conclusion, that it would pass the intermediate rents and profits) Lord *St. Leonard's* says this, "Notwithstanding this, the decision was still considered not to be quite conclusive, for I find that in 1793 the heir-at-law received a sum of £1500 for relinquishing all his rights to the property, and executing a deed in confirmation of the will ; the point, however, now admits of no doubt ; it is clearly settled by *Genery v. Fitzgerald*, and *Glanvill v. Glanvill (a)* ; a case of exactly the same character, that a gift of the rest and residue of my estate does, by force of the words, include the intermediate rents." At first it might seem as if Lord *St. Leonard's* was speaking of the residue of the real estate simply ; but when you look to the authority he is discussing, you find it relates to a mixed fund, and a mixed fund only.

The question is, whether any authority is to be found (and I have looked in vain for any such authority,) which has decided, that, after the bequest of a particular estate, on a series of limitations to which the rule of *Hopkins v. Hopkins* would apply, a devise of the residue of the

(a) 2 Mer. 38.

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real estate on the same uses and trusts is to be governed by a different rule, to the disadvantage of the heir-at-law. If you look at the nature of a residuary devise of real estate, the answer is obvious, that the mere fact of its being a residuary devise of real estate could not operate in the manner suggested, because, up to the Wills Act, the residuary devise of real estate was not less specific than a devise of *Blackacre*, since a person could only devise all the estates he had; that is, the actual property he possessed at the date of his will. There would seem, therefore, to be no reason why a simple residuary devise of real estate should have the operation contended for. Then the Wills Act could not, on this point of construction, make any difference, because all that that Act does is simply to sweep in everything which the testator might have at the time of his decease, but not to alter the rule of construction, which has been adopted in favor of the heir-at-law, namely, that you must find, for that is the rule, express words, or I should rather say manifest intention (necessary implication it has been sometimes called) on the face of the whole will to exclude him from that benefit which the rule of law has conferred on him. The simple fact of a devise of residuary real estate seems to me clearly not to alter the rule as to intermediate rents which is established in the case of a specific devise, nor do I find any authority which would authorise me to say so. However, in this case, there remains another point to be considered. There is a subsequent gift of all the testator's personal estate, for the purpose of being laid out as to two-thirds of it in land to be settled in effect to the same uses as are prescribed with regard to the real estate after the expiration of the life estates. Now it is said, and no doubt there is much weight in the observation, that, as you find it held that a general gift of all real and personal estate to certain intents, uses, and purposes is to be read as manifesting the intention that the rents and profits are

to pass exactly in the same manner as the income of the personal estate passes, and that the heir is thereby to be deprived of the benefit of the rule laid down in the cases I have referred to, it would seem singular to say that the mere circumstance of the testator dividing the will into two parts, and disposing of the real estate in one clause, and of the personal estate in another, should be held to lead to a different conclusion. But I do not think that this reasoning is sound. The rule which gives intermediate rents to the heir is the artificial result of our peculiar doctrines in this country in favour of the heir's position; and though the Courts have considered that where a testator has distinctly and clearly in his will mixed up realty and personalty in one fund, he must be taken thereby to have indicated an intention that they should go in the same way; that reasoning does not apply to a case where he has carefully and deliberately isolated the two properties, giving precise limitations as to the one in one portion of the will, and precise limitations as to the other in another portion of his will; and where, as in this case, he was plainly not contemplating any such complete mixture at all, because the first operation which he directs as to the personalty is to divide it into three several parts, and give two-thirds to the one class of objects of his bounty, and one-third to the other. There is nothing on the face of the will which in the least can justify me in saying that the testator has mixed up the whole of his property in one mass, so as to bring the case within the rule in *Genery v. Fitzgerald*. I think, therefore, it is impossible to exempt this case from the authority of *Hopkins v. Hopkins*; and I am bound to declare that the interim rents of the residuary real estate are undisposed of.

Now, as regards the personal estate, the case seems to be equally concluded, upon the authorities, the other way. From the time of *Green v. Ekins*, followed as that case

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has been by numerous authorities, the rule as to personal estate has been exactly the opposite to the rule as to real estate. When you give personal estate, you have given all its produce, as long as the law allows it to be accumulated or to remain in suspense; that estate and the whole of its produce go to the purpose indicated in the will, and the gift of the personal estate *ex vi termini* carries with it all the intermediate profits which may arise in respect of that estate.

I see no difficulty whatever, on the face of this will, in applying the rule. The testator gives all his personal estate, and directs it to be laid out in the purchase of real estate to be settled, as to two-thirds, to the same uses as he had declared of the real estate after the life interest. If *Hopkins v. Hopkins* had been good law as to the second branch of the case, it would have been an authority on the point in favour of the heir-at-law, assuming the heir-at-law and the next of kin to have been different persons; but on that branch of the case it is clear that the decision as to the personal estate directed in the will to be invested in the purchase of real estate was wrong; the decision there affected to follow the will of the testator to a certain extent by converting his personal estate into real estate; and then arose the singular confusion, as it appears to us now (for it is very remarkable that so many great minds were misled, until the point was made clear by subsequent discussion and argument) by which the will was held to operate for the purpose of converting the personal estate into real estate, not for the objects of the will, but in the interests of a person not in the least in the contemplation of the testator, namely, the heir-at-law. The proposition now seems to us to be a truism, that the heir-at-law, claiming in default of disposition, cannot claim anything under the dispositions of the will; the only mode in which the heir could possibly claim personal estate would be by an express or implied gift in his favour in the will. But the notion of the

heir-at-law taking by intestacy any portion of the personal estate is of course a solecism when the proposition is reduced to its clear terms. That part of the case of *Hopkins v. Hopkins* cannot, therefore, be an authority with reference to the decision of the present case. In this case all I have is a direction that the executors and trustees are to take the whole personal estate, and, taking the whole personal estate, are of course to take all its income, and to hold it on certain trusts. Then the first process is to divide it into one-third and two-thirds, and when that is done, the two-thirds are just as much given with all their produce, as the whole of the residue, if it was given in an entirety, would be, and those two-thirds, with all their produce, will have to be invested in the manner described. The circumstance that the trustees may have invested a part of it, and that long before the executory limitations take effect, has nothing to do with it; it is still personal estate, supposing the executory limitations to fail. It is personal estate until the will has had the effect of operating upon it to hand it over in some other shape to some persons interested, and, being personal estate, the rents and profits of it are the produce of personal estate just as much as before the money was invested; and those words which say that in the interim the produce shall be disposed of in the same manner as the rents and profits, carry the case no further. It would be a *petitio principii* to say, that those words can guide me as to what is to be done with the interim income; they only say that the trusts are to extend alike to interim income, and to rents and profits; and the question is, what is to be done with the rents and profits of that which is personal estate, until, for the purpose of the will, some person takes it in the form of realty. Those rents and profits are part of the produce of the personal estate as much after investment as before, and will go in the same manner. *Skrymsher v. Northcote*, which was relied on, has not the slightest bearing on the matter,

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Scrymsher v. Northcote was one of the simplest cases that can possibly be conceived. A portion of residuary personal estate was given to the extent of £500, which, as in the case of *Page v. Leapingwell* (a) and that class of cases, was held to be a particular portion of the residuary estate; and the gift of a portion of the residuary estate failing, of course it went to the next of kin: there is nothing here analogous to that.

It was suggested, that if the gift is supposed to carry the income, two-thirds of the personalty would be invested in the purchase of real estate; and that when the rents of that real estate are found to be unappropriated, for want of a person in esse capable of taking them, they must go back in thirds, that is, one-third must go over to the person entitled to the one-third of the residue, and two-thirds to be disposed of for the other purposes of the will. Thus, it is said, there would arise an absurdity. But that is not the mode in which the gift will operate according to the authorities. If I give the whole of my personal estate to be invested on trusts—similar to the trusts of these two-thirds—all the interim income will have to be applied exactly in the same manner as the capital in the purchase of real estate. What difference can it make, if, instead of giving the whole, I say, I give two-thirds of it? All that is necessary is to divide the whole fund into three parts, and deal with the two-thirds in the manner I have described. It seems to me that the circumstance of the division into portions of two-thirds and one-third can have no effect in leading me to a contrary conclusion to that to which the authorities would lead me if the whole property were given in one mass. The *Solicitor-General* also threw out an observation, that one might infer from the nature and mode of the gift a sort of converse rule to that laid down in *Genery v. Fitzgerald*; the answer to which is simply this: The rule in *Genery v. Fitzgerald* is applied in order to effectuate the supposed intention of the testator, which, accord-

(a) 18 Ves. 463.

ing to the general rule of *Hopkins v. Hopkins*, is not allowed to operate on rents and profits, without what is considered to be necessary implication, sufficiently to oust the right of the heir. But what the *Solicitor-General* suggests is, that when there are what, on the authorities, I must treat as plain words of gift of the personal income, I am to infer something to destroy that gift. I hold that there is a clear gift to be applied in a particular manner; and I can raise no inference against that gift from anything contained in the former limitations in the will, there being in truth nothing to lead to an inference which ought to destroy the gift so made.

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I should have mentioned that the case of *Turton v. Lambarde*, which was relied on, appears to me to contain nothing at all militating against the conclusion at which I have arrived. As to chattels real, I did not hear a single argument, and do not know whether there are any; and, therefore, I make no declaration as to them; but if necessary, the case can be spoken to on that point.

It having been ascertained that there were chattels real affected by the will, the cause was put into the paper to be spoken to, when it was not disputed that the interim income of the chattels real would fall into the general residue of chattels real; and the minutes were amended accordingly.

June 3rd.

DECLARE that the Defendant the Countess of *Bective*, as heiress-at-law of the testator, is entitled to the rents and profits of the residuary real estate, and of the estate devised by the codicil, until such time as the said estate shall vest beneficially in some person entitled thereto in possession under the devise thereof contained in the will to the trustees upon the trusts thereby directed to take effect after the decease of the testator's widow and daughter, or the sooner determination of the estate limited in use to his said trustees during the life of his said daughter of and concerning the *Kirkby Lonsdale* and *Mansergh* estate. DECLARE that the interim income of the testator's chattels real, until such time as aforesaid, falls into the general

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residuc of the personal estate. DECLARE that two-thirds of the residuary personal estate of the testator, including the income issuing from such two-thirds until some person shall be entitled in possession to the income of the real estate directed by the will to be purchased, with such two-thirds, and conveyed to the uses therein mentioned ought to be laid out in the purchase of such estates accordingly; and that there is no intestacy in respect of such income of the said two-thirds of the residuary personal estate.

Costs out of corpus of personal estate.

DORLING v. CLAYDON.

July 3rd.

Vendor and
Purchaser—
Title—*Inheritance Act, 3 & 4
Will. 4, c. 106.*

A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption, until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase.

THE Bill in this case was filed for the specific performance of an agreement of the 11th October, 1855, and the 11th October, 1856, by which the Defendant agreed to take, and *S. B. Hatton* agreed to accept a lease of certain farm premises in *Suffolk*. The Defendant entered into possession, and paid rent during *Hatton's* life. *Hatton* died on the 18th of March, 1857, intestate, and the Plaintiff claimed to be his heir-at-law. The Defendant had declined paying rent, not being satisfied with the evidence offered of the Plaintiff's title, but professed his willingness to perform his agreement on the Plaintiff's title being shown.

The decree, dated 15th February, 1862, directed specific performance in case the Plaintiff could make a good title, and the Defendant admitting that *Hatton* was seised in fee, an inquiry was ordered, whether the Plaintiff as heir-at-law of *Hatton* or otherwise, could make a good title.

The evidence proved that the Plaintiff was the heir if *Hatton* was the purchaser; and the Defendant in the proceedings in Chambers called for affirmative evidence of this, he himself having produced no evidence that *Hatton* inherited the property.

On an application in Chambers, in July, 1862, it was ordered, that the Defendant should be at liberty to examine the Plaintiff. The result was to show that the Plaintiff had evidence showing that *Hatton* was a purchaser—but nothing to suggest the contrary. The question whether such evidence ought to have been produced by the Plaintiff was now raised on a motion to vary the certificate, and on further consideration, in order to fix the time from which the Plaintiff was to be considered as having made out his title.

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Statement.

Mr. *Dunn* for the Defendant :—

We know nothing of *Hatton's* position, except that he was seised in fee ; whether he took by purchase or inheritance does not in any way appear in the abstract and evidence produced by the Plaintiff, and has only been extracted by subsequent examination. If *Hatton* was a purchaser, we admit the Plaintiff's title as heir. If he took by inheritance, the heirship was not proved.

Argument.

We insist that the Plaintiff was bound to produce at least prima facie evidence that *Hatton* was a purchaser. He refused to produce any such evidence, and relied on the Inheritance Act, 3 & 4 Will. 4, c. 106, s. 2, which enacts, that the descent shall be traced from the purchaser, but that the last owner shall be considered to be the purchaser, unless it shall be proved that he inherited the same. But this clause was not meant to relieve a vendor from the obligation of producing the evidence in his possession, which would show particularly how the fact was, instead of leaving it to rest on presumption.

Lord *St. Leonard's* considers that a vendor making title as heir, must give such affirmative evidence as he possesses that the ancestor from whom he traces his descent was a purchaser (a).

(a) V. & P. 13th Ed. p. 382.

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 v.
 CLAYDON.
 Judgment.

Mr. *Giffard*, Q.C., and Mr. *Humphry* for the Plaintiff.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

At the Hearing, the Defendant, who had paid rent to *Hatton*, was obliged to admit that he was seised in fee, and that admission is recorded on the face of the decree. The only question, therefore, is whether the present Plaintiff is heir of *Hatton*. That he is such heir if *Hatton* was a purchaser, is not disputed, though the title is not proved if it should turn out that *Hatton* came in by inheritance. The only question I have to decide is, whether the Plaintiff was bound to produce any affirmative evidence which he might have in his power, that *Hatton* took by purchase; and in the course which matters have taken in Chambers, this inquiry is chiefly material on the question of costs.

The statute says, that, in the absence of proof to the contrary, a person seised must be presumed to be a purchaser; and the Plaintiff contends, that, until some evidence to the contrary appears, he is entitled to rest on this presumption, and is not bound to produce any affirmative evidence on the point. I have already, in substance, decided the point in favor of the Plaintiff on an application before myself in Chambers, when I remember that my attention was called to Lord St. *Leonard's* observations. A vendor knowing anything which tended to rebut the presumption that the ancestor, from whom he traces his descent, was a purchaser, would be guilty of a gross breach of faith if he did not disclose it; but if, in truth, he has no such knowledge, I think he is entitled to rely on the presumption, and to decline to give evidence on the point until some *prima facie* proof to the contrary is produced. I thought, however, that the Defendant was entitled to search the Plaintiff's conscience

on the point, and, therefore, in Chambers, I gave him leave to examine the Plaintiff. The result has shown that the Plaintiff knew nothing to cast any doubt on the fact that *Hatton* was a purchaser, and that he had in his possession evidence that sufficiently proved the fact. I think, under these circumstances, he was justified in not going into any evidence on the point in the first instance, and that he must be taken to have made out his title from the time when he proved his pedigree in other respects. He tendered the evidence of this before filing the Bill; and, therefore, I cannot hold the title to have been defective at any time since the commencement of the suit.

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v.
CLAYDON.
Judgment.

HARDCASTLE v. HARDCASTLE.

THIS case raised a question of construction on the will of *Henry Lambirth*, dated 25th of March, 1839. The material clauses were as follows:—

“And as to my said leasehold land and premises hereinbefore given, I direct that my trustees and the survivors and survivor of them, and the executors and administrators of such survivor, shall stand possessed thereof, (subject as in this my will is mentioned,) upon trust for my said granddaughter *Frances Lambirth* and her assigns during so long time of the residue of the term or terms for which the same are respectively held as she shall so happen to live; and from and after her decease, upon trust for all and every the child and children of the body of my said granddaughter lawfully to be begotten, until such child and children shall respectively attain the age of twenty-five years or die leaving issue of his, her, or their body or respective bodies, and then upon trust for such child or children so attaining the age of twenty-five years, or dying and leaving

1862
Nov. 13th, 24th.
Will—Remote-
ness—Vesting.
Bequest of residue upon trust to apply such part as the trustees should think fit for maintenance of *A.* until twenty-one, then to pay her out of income £500 a-year until twenty-five, and then for *A.* for life, and after her death for all her children until they should respectively attain twenty-five, then for such children so attaining twenty-five; with a gift over. Similar bequest of leaseholds, except that it concluded with an absolute life interest in *A.*

Held, that the children of *A.* took vested interests at birth, and that the gift over was void for remoteness.

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such issue, equally as tenants in common, their respective executors, administrators, and assigns; and in case all such children save one shall die under the age of twenty-five years, without leaving such issue as aforesaid, or if there shall be but one such child, then in trust for such one or only child until he or she attain the age of twenty-five years, or die leaving issue as aforesaid; and then in trust for such one or only child, his or her executors, administrators, and assigns. And in case there shall not be any child of the body of my said granddaughter lawfully begotten, or being such if every of them shall die before any of them shall attain the age of twenty-five years without leaving issue as aforesaid, then in trust for my said nephew *Henry Lambirth*, his heirs, executors, administrators, and assigns absolutely."

And the testator directed his trustees to convert his residuary personal estate, and apply so much of the dividends, interest, and annual produce thereof, and of the rents and profits of his other estates and property, as they should think proper, for and towards the maintenance, education, and bringing up of his said granddaughter the Defendant *Frances Hardcastle* till she should attain the age of twenty-one years, and accumulate the surplus of such rents, issues, dividends, interest, and produce till she should attain the age of twenty-one years, and should thenceforth, until she should attain the age of twenty-five years, pay and allow to her out of such interest, dividends, rents, and profits, and the interest, dividends, and produce of such accumulations as aforesaid, a clear annual sum of £500 only, and accumulate the surplus during that period; and should afterwards pay and apply the whole of the dividends, interest, and produce of his said personal estate, so to be laid out and invested, and the said rents of his said other estates and property, and the dividends, interest, and annual produce of the various accumulations aforesaid, to his said granddaughter and her assigns during her life. And the

will proceeded as follows:—"And from and after her decease, then as to the whole of the said last-mentioned personal estate, with all accumulations thereof, or the stocks, funds, or securities in or upon which the same shall be then invested, I direct that my said trustees, and the survivors and the survivor of them, and the executors and administrators of such survivor, shall stand possessed thereof in trust for all and every the child and children of my said granddaughter *Frances Lambirth* lawfully to be begotten, until such child and children shall respectively attain the age of twenty-five years, or die leaving issue of his or their body or respective bodies; and then in trust for such child and children so attaining the age of twenty-five years, or dying and leaving issue, in equal shares, their respective executors, administrators, and assigns. And in case all such children save one shall die under the age of twenty-five years, without leaving issue as aforesaid, or if there shall be but one such child, then in trust for such one or only child until he or she shall attain the age of twenty-five years or die leaving issue as aforesaid; and then in trust for such one or only child, his or her executors, administrators, and assigns; and in case there shall be no such child of the body of my said granddaughter lawfully begotten, or being such if every of them shall die before any of them shall attain the age of twenty-five years without leaving issue as aforesaid, then in trust for my said nephew *Henry Lambirth*, his executors, administrators, and assigns absolutely." And after providing for the cesser of certain of the annuities given by the said will in case of any alienation thereof by the annuitants, the testator proceeded as follows:—

"Provided and it is my will, that, notwithstanding anything herein contained, it shall and may be lawful to and for my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, at any

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time or times to advance during the respective minorities of any child or children, (except the said *Frances Lambirth*), who shall become entitled to a presumptive share or shares of and in my said personal estate and accumulations so to arise and be placed out as aforesaid, such part or respective parts of such presumptive share or shares as my said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, shall think proper for the placing out of any such child or children to any trade, profession, or employment, or otherwise in or towards his or their advancement in life."

The testator died on the 25th of November, 1834, leaving him surviving a widow, and his said granddaughter *Frances* (now the Defendant *Frances Hardcastle*), his sole next of kin. *Frances Hardcastle* subsequently purchased the interest, if any, of the widow, and claimed to be entitled to the leasehold and personal residue as undisposed of after her decease.

The Bill was filed by her children to establish their claim under the will:—

Argument.

Mr. *Rolt*, Q.C., and Mr. *B. Beales* for the Plaintiffs:—

The gift to the children is vested at birth, and the remoteness of the period fixed for its becoming indefeasible does not affect its validity: *Bland v. Williams* (a), *Greet v. Greet* (b), *Davies v. Fisher* (c), *Milroy v. Milroy* (d), *Harrison v. Grimwood* (e), *Peard v. Kekewich* (f).

Mr. *Daniel*, Q.C., and Mr. *Cutler*, for *Frances Hardcastle* and the trustees of her settlement:—

There is no vested interest until an event which is too

(a) 3 M. & K. 411.

(b) 5 Beav. 123.

(c) 5 Beav. 201.

(d) 14 Sim. 48.

(e) 12 Beav. 192.

(f) 15 Beav. 166.

remote. The income only is vested before twenty-five or death leaving issue, the age being made part of the description: *Vandry v. Geddes* (a), *Shum v. Hobbs* (b).

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The shares are referred to as "presumptive shares," which confirms our view.

[The VICE CHANCELLOR referred to *Bull v. Pritchard* (c)]

The gifts over are clearly void.

Mr. *Hetherington* for a mortgagee of one of the children.

Mr. *Rolt* in reply referred to *Bell v. Cade* (d).

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Nov. 24th.
Judgment.

This is a question of the validity of the disposition of leaseholds and residuary personal estate contained in the will of *Henry Lambirth* in favour of the children of the testator's granddaughter *Frances*. The frame of the bequest is such as to raise a question upon the authorities, whether the gift is vested, and, if not, whether it is not void for remoteness. If it is not vested, indeed it is clearly too remote; and the essential question is, whether a vested interest is created.

With respect to the leaseholds the testator directs his trustees to hold them upon trust for his granddaughter *Frances* for life, and after her decease upon trust for all and every her children until such children shall respectively attain the age of twenty-five years, or die leaving issue, and then upon trust for such children so attaining the age of twenty-five years, or dying leaving such issue, equally as tenants in common, their respective executors, administrators, and assigns; and if all such

(a) 1 R. & M. 203.

(c) 5 Hare, 567.

(b) 3 Drew. 93.

(d) 2 J. & H 122.

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 Judgment.

children but one die under the age of twenty-five years without leaving issue, or if there be but one such child, then in trust for such one child until he or she attain the age of twenty-five, or die leaving issue, and then for such one child, his executors, administrators, and assigns. And then there is a gift over if there shall be no child, or all shall die under twenty-five without leaving issue.

The personal residue is given in the same way, subject to a previous trust to apply so much of the income as the trustees should think proper for the maintenance of the granddaughter *Frances* until twenty-one, accumulating the surplus; and then to pay her £500 a year until twenty-five, accumulating the surplus; and then to pay the income of the fund and its accumulations to her for life; the ulterior limitations comprising in terms "the whole of the said personal estate with all accumulations." There is also a proviso at the end of the ulterior limitations empowering the trustees to advance, during the minority or minorities of any child or children (except the said *Frances Lambirth*), who shall become entitled to a presumptive share of the personal estate and accumulations, such part of such presumptive share as the trustees shall think fit.

It is material to observe, that the amount to be applied in the maintenance of the granddaughter is left to the discretion of the trustees, whereas, with respect to her children, there is no direction that during their minorities a sufficient part only shall be appropriated to their maintenance. If such a direction had been contained in the will, it would have been conclusive against a vesting in them, because in that case they could not be treated as entitled during minority to the whole interest.

That difficulty being out of the way, the case must be determined on the principles of the authorities, which are clearly discriminated by Vice-Chancellor *Wigram* in *Bull*

v. Pritchard. If you find the condition of attaining a certain age made part of the description of the objects of the gift, the interest does not vest until the age is attained ; but if this is not so, or if the whole intermediate interest is appropriated for the benefit of the same objects, there the Court holds (as was laid down by Sir *W. Grant* in *Hanson v. Graham*), that the whole property vests in the object of the gift, though the absolute enjoyment be deferred until the specified time. These rules are so well settled that I need not enter into any detail upon the point. It is enough to observe, that in *Hanson v. Graham* Sir *W. Grant* held, that, where the whole interest was given to the legatee throughout, and the actual property was given when the legatee should attain twenty-one, the word "when" postponed the enjoyment only and not the vesting.

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HARDCASTLE,
Judgment.

The whole question here is, whether the words as to age are so attached to the children as to form a necessary part of the description. I have come to the conclusion, that, having regard to the use of the word "such" throughout, that would not be the true construction, the regular antecedent being, all and every the children. We do not find the phrase such as attain twenty-five, but such children so attaining twenty-five ; that is, all the children when they attain twenty-five. The case, therefore, is essentially the same as *Hanson v. Graham*, the gift being immediately vested, but the period of absolute vesting in possession being when they attain twenty-five, or die leaving issue. These considerations may sound somewhat refined to any person not accustomed to legal decisions, and the circumstance of there being a gift over might suggest the inference, that the property was intended to be kept in suspense. The soundness of the observations in this sense, contained in the judgment in *Scott v. Bargeman* (a), and which are to be found also in later cases, has, however, been questioned by Sir *W. Grant* in *Skey v. Barnes* (b), and in other

(a) 2 P. W. 69.

(b) 3 Mer. 335.

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v.
HARDCASTLE.
Judgment.

authorities ; and in *Davies v. Fisher*, Lord *Langdale* lays it down, that, in ordinary cases, a gift over on a contingency does not prevent vesting in the first donee, though it may be an ingredient in the question.

Considering the great length which the authorities have gone in favor of vesting, and looking to the fact that the whole interest is given to the objects of the bequest, and having regard especially to the authority of *Davies v. Fisher*, it appears to me that I must hold that the will creates a vested interest in all the children of the testator's granddaughter. The rule as to perpetuities cannot affect this question of vesting, and I should have come to the same conclusion if the age named had been twenty-one.

Something was supposed to turn on the use of the phrase, "presumptive shares ;" but that is sufficiently explained by the circumstance, that the shares might alter in amount as the children were born, and in that sense each share would be presumptive until the number was ascertained.

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DECLARE that the several children of the testator's granddaughter *Frances* became entitled at birth to a vested interest in the leasehold estate and the residuary personal estate ; and that the gift over in the event of all such children dying under twenty-five without leaving issue, is void. Costs out of the residuary personal estate.

GURNEY v. GURNEY.

THIS was a suit to carry out the trusts of a settlement made on the children of Mr. and Mrs. *John Henry Gurney*, under the following circumstances :—

John Henry Gurney, of *Catton Hall*, Esq., M.P., was married in 1846 to Miss *Mary Jary Gurney*. In December, 1859, Mrs. *Gurney* eloped with one *Taylor*, and left *England* with him ; and they remained abroad till September, 1860.

On the 31st December, 1859, *John Henry Gurney* instituted a suit in the Court of Matrimonial Causes for the dissolution of his said marriage, and obtained a decree nisi on the 13th of February, 1861, which was made absolute on the 22nd of May, 1861.

On the 4th of May, 1861, Mrs. *Gurney* was confined of a full-grown male child, the Defendant *William Anselm Gurney*.

Since the dissolution of her marriage with *John Henry Gurney*, *Mary Jary Gurney* had married *Taylor*.

In the month of January, 1862, *John Henry Gurney* transferred a sum of £2000, 3l. per Cents., into the names of trustees, "upon trust for all and every the children now living of the said marriage between the said *John Henry Gurney* and *Mary Jary Gurney*, and their respective executors, administrators, and assigns," as tenants in common ; and the deed of settlement of the said trust fund provided that it should be "incumbent on the trustees or trustee for the time being to pay and apply the whole of the interest, dividends, and income" of the settled fund for the maintenance and education of the children entitled thereto respectively ; and that the trustees might either so apply the income themselves, or might pay it to the respec-

1863.

April 29th,
May 5th.

*Declaration of
Illegitimacy—
Illusory Trust.*

The Court will not refuse to entertain a suit for the execution of the trusts of a settlement, where the settled fund actually exists, merely on the ground that the settled fund is so small as to be of no importance to the cestui que trust, and that the settlement was really made to raise a different question (which the Court would not have directly determined,) by a side wind. Nor will the Court allow such a question to be evaded by a counter settlement.

But, *semble*, the Court would not entertain such a suit at the instance of a stranger, nor if it appeared to have been instituted with a malicious motive.

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Statement.

tive guardians of the children, without being bound to see to its application.

The Bill was filed by the two infant children of the marriage, born before the said elopement, by their father as their next friend, against the infant *William Anselm Gurney* and the trustees of the settled fund, for the purpose of having the trusts thereof carried into execution.

It was admitted that the Bill had been really filed to raise the question whether the Defendant *William Anselm Gurney* was or not to be taken as a legitimate child of the marriage of Mr. and Mrs. *Gurney*: and it was further asserted, and not denied, that the real object of the suit was to determine prospectively whether the Defendant *W. A. Gurney* would or not be entitled to share in a sum of £400,000 and upwards, to which *Mary Jary Gurney's* children would, under her father's will, become eventually entitled amongst them. The Bill averred that the Defendant *W. A. Gurney* was not issue of the marriage, but an illegitimate child of *Mary Jary Gurney*; and the Plaintiffs therefore prayed for a declaration that they were the only children of the said marriage, and the only persons entitled to any participation in the settled fund.

The guardian of the infant Defendant offered to bring into Court a sum of £1000, to be applied for his benefit in such manner as the Court should direct; thus enabling the trustees of the settlement, without breach of trust, and without prejudice to any question, to apply the entire income of the settled fund for the benefit of the Plaintiffs.

The evidence adduced was very voluminous, and a great number of witnesses had been examined and cross-examined before a special examiner; and the result was to lead his Honour to the conclusion that non-access within the time during which Mr. *Gurney* might have been the father of the child had been proved as a matter of fact.

Sir Roundell Palmer, S.G., Sir Hugh Cairns, Q.C., Mr. Aspland, and Mr. Hutton, for the Plaintiffs :—

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GURNEY.
Argument.

This is a clear case of non-access. The Court cannot hesitate to pronounce that Mr. Gurney could not have been the father of this child, and therefore that the Plaintiffs are entitled to the benefit of this trust fund in equal moieties.

The old rule of presumption of access never applied when the parties had been divorced à mensâ et thoro (a); and the proceedings pending in the Court of Divorce, coupled with the absence of any plea of condonation, amounted to the same thing.

[They referred to *Morris v. Davies* (b), *The Banbury Peerage case* (c), *Goodright v. Saul* (d), *Plowes v. Bossey* (e).]

Mr. Walford, for the trustees of the settlement, submitted to act as the Court should direct.

Sir Fitzroy Kelly, Q.C., Mr. Serjeant Ballantine, and Mr. G. N. Colt (Mr. Rolt, Q.C., with them), for the Defendant William Anselm Gurney :—

This is a mere scheme to anticipate the proceedings which will become necessary when the will of Mrs. Gurney's father has to be adjudicated upon. Mr. Gurney's fortune is well known; this £2000 is of no consequence to him, nor would he ever have instituted this suit if that had been his only interest in it.

This Court will not allow itself to be made the machinery by which a secondary object of this nature is to be attained. The only right of the Plaintiffs is, to have the testimony perpetuated by a proper proceeding; but this

(a) Hubback on Evidence of Succession, 412. (c) 1 S. & S. 153.
(d) 4 T. R. 356.
(b) 5 Cl. & F. 163. (e) 31 L. J., Ch., 681.

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 Argument.

Bill is not rightly framed for that purpose. All Courts set themselves against such schemes: *Re Elsam* (a), *Hoskins v. Lord Berkeley* (b).

The proceedings in the *Marquis Townshend's case*, in *Dom. Proc.* (c), with which your Honour is familiar, would have been unnecessary if such a course as this could have been resorted to. So again the *Earl of Bambury's case*, in *Dom. Proc.* (d).

[They also argued, on the facts, that non-access had not been sufficiently established; and they referred to *Head v. Head* (e), *The Gardiner Peerage case* (f), *Morris v. Davies* (g), *Nich. Adult Bastard* (h).]

At any rate, this Court will not refuse to accede to the offer by the infant's guardian to pay a sum of £1000 into Court for the infant's benefit, and thereupon to abandon all claim to this fund on his behalf, so as to give the Plaintiffs all the relief to which they could in any event be entitled.

The VICE-CHANCELLOR.—I do not think there is any doubt on the facts: the question is as to the novelty of the application. I recollect a case of a trust for the daughters of A. B., so long as they should continue chaste; the Court held the limitation void, as tending to disturb the peace of the family (i).

The *Solicitor-General*, in reply.—This trust is not of such a character, but a simple trust for the children of A. B.; and the only question is, who are those children? There is nothing fictitious here, as in the case of the attorney referred to by Sir *Fitzroy Kelly* (j). The facts suggested as to Mr. *Gurney's* fortune &c. are not in issue,

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| (a) 3 B. & C. 597. | (f) 9 Peerage Claims, paper 175. |
| (b) 4 T. R. 402. | (g) 3 Car. & P. 215. |
| (c) 17 Peerage Claims, paper 46. | (h) Page 282. |
| (d) 2 Peerage Claims, paper 48. | (i) This case does not seem |
| See p. 16. | to have been reported. |
| (e) 1 S. & S. 150; s. c. T. & R. | (j) <i>Re Elsam</i> , ubi sup. |
- 138.

nor proved by evidence, but are mere gratuitous suggestions.

More unsubstantial trusts than this have been supported—as for instance in the case of *Shelley's* children (a),—*Alicia Race's* case. And in the case of Mr. *Hope's* children (b) a reversionary interest in a sum of £500 was held sufficient to support a suit of which the real object was to take the custody of the children away from their mother; and yet if your Honour is to take judicial notice of the private fortunes of individuals, the name of *Adrian Hope* is sufficient to show how insignificant the sum really was to the parties.

The VICE-CHANCELLOR.—The Legislature (c) has expressly sanctioned suits for declarations of legitimacy, but not for declarations of illegitimacy; is not that an authority against such a Bill as this?

The *Solicitor-General*.—The jurisdiction of this Court is not affected by that Act.

Where the motive and purpose are honest, feigned issues have never been discouraged in this Court, and here so much is not necessary.

A suit to perpetuate testimony would not have given the Defendant so fair an opportunity of having the whole matter investigated as the course we have taken, of which therefore he cannot be heard to complain.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If this point had escaped my attention when the case was first opened, I should have thought it right to take time to consider my judgment upon it; but certainly it

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GURNEY
v.
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Argument.

Judgment.
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(a) *Shelley v Westbroke*, Jac. 266.

(b) *Hope v. Hope*, 22 Beav. 351; s. c. 4 D. M. G. 328.

(c) 21 & 22 Vict. c. 93.

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Judgment.

must have struck any one who has had to consider questions of this nature, that the course taken by the Plaintiffs is novel, with reference to the mode of obtaining, at so early a stage, a decision on a point of such importance; and I felt more or less pressed by the argument of Sir *Fitzroy Kelly*, that, although in many instances which have come before the Court, very large interests have been involved in the determination of a similar question, and although it must often have been a matter of vital importance to families to obtain a definitive decision at the earliest possible moment, yet such a course as this has never been suggested before, or at all events has never been carried into execution. I waited, however, to know what particular course of defence the Defendants might adopt, and therefore I did not think it right to call this point to the attention of Counsel. For aught I knew, the Defendants might have been equally anxious to have the status of this child finally determined now, because it seems to me that it would be better for him, so far as regards any interest that justice could acknowledge, to have his position fixed at once, rather than that he should grow up to riper years and have his education conducted upon an uncertain footing, when the result of that determination may, to a certain extent, affect his whole status and career. I say any interest which justice could acknowledge, because of course I could not take into consideration the possible interest that the child might have in the truth becoming obscured by the failure of evidence at a future time: that cannot be urged as a legal consideration why the Court should not come at once to a conclusion.

The cases cited by Sir *Fitzroy Kelly* do not seem to present any obstacle to this view of the subject. They are merely instances in which the Courts of Common Law have said—"We will not allow the forms of justice to be trifled with by having fictitious cases brought before us; we are

not courts of advice, but tribunals to decide practical questions :'' and therefore they have set their faces against fictitious cases of the nature described. This Court, no less than the Courts of Common Law, would refuse to entertain cases of that nature. I am afraid, indeed, that it is frequently made the instrument of advertising fancy articles, through the medium of motions for injunctions, in cases where it must be evident that the Court will not interpose; and in such cases, which bear more analogy to those cited than the present does, I think some test of bona fides might well be adopted. But though the Court would not interfere if there really were no case to be tried, and it were aware of that fact, still, it will not refuse to exercise its undoubted jurisdiction upon a point legitimately before it, merely because the determination of that point will involve important interests of far greater magnitude than the question at issue between the parties. One may easily conceive instances in which, without any previous arrangement for the purpose, the decision of a comparatively trifling matter might involve consequences of the gravest possible interest to the parties concerned.

But then it is said, that, though in this case there are great interests at stake, still the Bill merely asks for the administration of a trust, not bonâ fide created, but avowedly adopted for the express purpose of raising this question; and it is urged that, as this trust is merely a pretext for arriving at the desired conclusion, this Court ought not to carry it into effect. Now the class of cases alluded to by the *Solicitor-General* bears a striking analogy to the present on this point. Those cases were examples of that which is the constant practice of this Court—namely, of deciding, when necessary, questions which arise collaterally to the issue before it; even when the matter on which it has to exercise its jurisdiction has been expressly created for the purpose of raising the larger and graver question. There cannot be a stronger instance than the

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cases where the rights of parents over their children have been dealt with. And this has been done in the case of children who have been made wards of Court notoriously for the purpose of taking the child away from its mother, or of having the child brought up in a faith different from that of its surviving parent. The case of *Alicia Race*, before the Vice-Chancellor *Kindersley* (a), is a striking

(a) This case appears not to have been reported at the time. The following note has been compiled from the allegations in the petition, the affidavits filed on the occasion, and the notes in the Registrar's Book.

IN RE ALICIA RACE, an Infant.

Lamman Race, the father of the Infant in this case, was a Sergeant of Marines, who was killed at the battle of the *Alma*. He was a member of the Church of *England*; but his wife, the respondent *Alicia Race*, was a *Roman Catholic*.

Lamman Race, by his will, appointed his wife sole legatee and executrix, "being fully confident that she will do justice to my two children as a wife and mother." He left no specific directions as to the manner of their education, or the religion in which he desired them to be brought up.

The two children mentioned in the will consisted of the petitioner, who at the time of her father's death was aged about ten and a half years, and a boy, *John*, then aged about twelve.

In the year 1855, *John* was placed at the Sailors' Orphan Boys' School at *Woodstock*, and *Alicia* was sent to the Sailors' Orphan Home at *Hampstead*.

Early in October, 1856, the respondent *A. Race* applied to the authorities of the boys' school for her son, and he was on such application given up to her.

On the 23rd October, 1856, she made a similar application for the Petitioner; but the Petitioner showing great reluctance to go to her, and expressing a strong wish to continue at the Home, and be educated as a Protestant, Mrs. *Clarke*, the matron of the Home, refused to give her up.

It was admitted that the object of the Respondent was to educate both her children as *Roman Catholics*.

The Respondent, immediately upon such refusal, applied to the Court of Queen's Bench for a writ of Habeas Corpus, directed to the said Mrs. *Clarke*; and on the argument on the return of the said writ, that Court, on the 17th January, 1857, directed the Petitioner to be given up to her mother, the Respondent *A. Race*, as her guardian of

instance of this. How can I then escape from determining who are the objects of this trust, because I have a suspicion, or even because I know it as a fact, that the father

nurtured (*Reg. v. Clarke*, 7 E. & B. 186). On the 29th January, 1857, the sum of £21. 6s. Consols was transferred into the name of the Petitioner *A. Race* and another, in trust for the said Petitioner; and on the same day a suit of *Race v. Race* was instituted by a person named *Pinkhorn*, as next friend of the Petitioner, against the Respondent. This Bill was afterwards amended by adding a Defendant; but no further steps were taken therein. On the 7th February, 1857, this Petition was presented in the suit; but it was afterwards amended by intitling it as above, and it prayed for a declaration that the Petitioner should be brought up as a Protestant, and that a scheme for her education should be settled by the Court.

Several affidavits (setting forth the above facts, and many others not material to the present purpose,) were filed in support of and against the Petition; and the undertaking mentioned in the order was given; and the signatures thereto duly verified by affidavit.

The Petition, along with a motion in the suit, was heard before the Vice-Chancellor KINDERSLEY, on the 11th February, 1857, when the following Order was made:—

On the Petition of the Plaintiff, by *James Pinkhorn* her next friend, and on motion this day made by Mr. *Bailey*, Mr. *Ellis*, and Mr. *Hadden*, of counsel for the Petitioner, and upon hearing Mr. *Bagshawe*, Sen., and Mr. *Bagshawe*, Jun., of Counsel for the Respondent *Alicia Race*, and upon reading [certain evidence therein mentioned, and particularly] an undertaking signed by *Edward Henry Bickersteth*, *William Dugmore*, *John Edward Woodroffe*, *John Gurney Hoare*, and *Robert Prance*, to clothe, educate, and maintain the Plaintiff *Alicia Race* during her minority, or until further order: THIS COURT DOETH DECLARE that *Alicia Race*, the infant in the Petition named, ought to be brought up as a Protestant, and not as a Roman Catholic. And the said *Edward Henry Bickersteth*, *William Dugmore*, *John Edward Woodroffe*, *John Gurney Hoare*, and *Robert Prance*, by their Counsel, undertaking jointly and severally that they will to the extent of £25 per annum maintain the said *Alicia Race* in a manner suitable to her present station in life during her minority, or until further order of this Court; and also, by their Counsel, undertaking, if the Court should require it, to execute any deed or covenant for effectuating that purpose: IT IS ORDERED that a proper person or persons be appointed the guardian or guardians of the said *Alicia Race* during her minority, or until the further order of this Court. AND IT IS ORDERED that all persons shall have liberty to apply to this Court as there may be occasion.—*Reg. Lib. B.* 1856, p. 420.

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made this settlement on purpose to raise the question, whether or not a particular child is one of his family.

The strongest way of putting it is, that you might allow the peace of families to be disturbed by some stranger, who might make a settlement of this sort for the express purpose of having it decided whether one or other of the members of the family against whom he had some personal antipathy were legitimate or illegitimate; and such a case as that would be analogous to the celebrated wager case concerning the sex of the Chevalier *D'Eon* (a), which the Courts of law refused to entertain, and to the case to which I alluded during the argument, where this Court struck out of the provisions made for the children of a family a limitation giving over the share of one of the ladies, against whom there was no imputation, in case she should be found to have been guilty of an illicit connexion. I think the answer given to this by the *Solicitor-General* is the true one; the Court must deal with such cases when they arise, and according to the special circumstances of each. Nothing that I decide now will affect the case of a mere stranger creating a trust of this description for the express or presumable purpose of disturbing the peace and happiness of a family with which he has no connexion. I have here the case of a father, who, with good reason, disputes the legitimacy of a child who has been born during the time that the mother was still his wife; he has other children, and he considers it of the deepest importance, (and no one can dispute that it is so, not only for the other children but for this unhappy infant himself,) that he should know exactly what the state of the family is, and whether there are two or three children who are to be deemed his children. A more legitimate object cannot easily be conceived.

Then this settlement is made, and I am asked by the

(a) *De Coste v. Jones*, Cowp. 729.

two infants to execute the trusts thereof. It is greatly to the interest of the Plaintiffs that the question should be determined, and there is nothing to interfere with their right of having their interest in the fund ascertained, and ascertained at once.

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The mode of meeting this, which has been proposed, I could not listen to for a moment. The guardian of this child says, "I will provide such a sum as will put this child in as good a position, pecuniarily, as he could be placed in by the Court, and then I will consent that the infant Plaintiffs are to have this fund applied solely to their use, and they will thus have all they can have a right to ask." If I were to allow that to be done, it would be simply to stultify all the proceedings of the Court: it would be saying, that, where the fund was small, the action of the Court could be bought off; but that if the sum were too large for that course to be convenient, say £20,000 instead of £2000, then the suit must take its course. Obviously, the Court could never be a party to any bargain of that kind: the matter must be determined, and determined according to the strict rights of the parties.

I was struck at the time with one remark of Sir *Fitzroy Kelly*, with reference to the course taken by the Legislature in allowing suits for declaration of legitimacy, but not for declaration of illegitimacy; and he based upon that an argument, that it was not intended that there should be any power in any Court in this country to make a declaration of illegitimacy; but it is a sufficient answer to that contention, to point out that a declaration of legitimacy would at once fix the status of the party; it would be a proceeding in rem, conclusive as against all the world; and therefore, when a totally new remedy (a) is introduced, the Legislature may have thought it a disturbance of the peace of families to have questions of illegitimacy

(a) 21 & 22 Vict. c. 93.

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made the subject of a special proceeding : at the same time, Parliament must be taken to have been aware that this question must continually arise incidentally in the exercise of the ordinary jurisdiction of this Court, and I do not see any indication of intention on their part to interfere with that jurisdiction.

For instance: any collateral relation of Mrs. *Gurney* might die to-morrow, having by his will made a provision for her children exactly in the terms of this settlement ; and it might become necessary that his estate should be administered in this Court, and as ancillary to that administration this identical question would have to be argued and determined. Am I to assume, in the absence of all direct expression of intention, that the Legislature intended to deprive this Court of its ancient and undoubted jurisdiction, because it has not thought fit to extend to this case the new remedy provided for the converse case? I think that that would be a very strange and unwarranted conclusion, and therefore I do not consider that there is anything in the late Act of Parliament which ought to weigh with the Court either against or in favour of this proceeding. This is a totally different species of jurisdiction ; the decision I am about to pronounce will not be binding on anyone except the parties, and will not be conclusive even on them in a proceeding with respect to any different trust. It is true this is a case of the first impression, yet it is not a case in which I can say that I am not bound to exercise the ordinary jurisdiction of this Court.

As regards the facts, it may be said that the cause is an undefended one ; not that Counsel have not from first to last done everything that could be done in the interest of this Defendant ; but that, though everything has been done to prove, if it could be proved, the legitimacy of this third child, the evidence is of such a nature that Counsel have hardly attempted to argue that it is not conclusive against such

legitimacy, provided only the Court can entertain the question at all.

[His Honour then considered the evidence in some detail, and came to the conclusion that there was no doubt of the illegitimacy of the child. The case was a much stronger one than *Morris v. Davies* (a).]

A declaration was therefore made in the terms of the prayer of the Bill. The trustees to have their costs out of the fund. No other order as to Costs.

(a) *Ubi sup.*—see p. 211.

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DUNDAS v. WOLFE MURRAY.

THE residuary estate of the Duchess of *Leeds*, consisting principally of certain sums of stock, stood vested by her will in trustees, subject to a general testamentary power of appointment in the survivor of her two granddaughters.

Mrs. *Wolfe Murray*, the testatrix in the cause, was the surviving granddaughter, and by her will, dated the 20th of December, 1856, she recited the power, and directed that the trustees of the will of the Duchess of *Leeds* should, from and immediately after the decease of the testatrix, stand possessed of the said stock and premises, upon trust to raise thereout the sum of £5000, and to pay the same equally between the five children of her late sister Lady *Catherine Dundas* (naming them), the shares of such of them as were sons to be paid to them on their respectively attaining the age of twenty-one years, and the shares of such of them as were daughters to be paid to them on their respectively at-

taining five nephews and nieces, the shares of sons to be payable on their respectively attaining twenty-one, and of daughters at twenty-one or marriage respectively, with benefit of survivorship, and upon trust to apply the residue for the benefit of certain other persons:—

Held, that the interests vested immediately on the death of the testatrix, and that the nephews and nieces were entitled to the interim income arising from their respective shares.

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Will—Vesting
—Severance of
Fund—Interim
Income.

Where a fund is severed immediately from a testator's death for the benefit of the objects of the gift, the interests are vested and carry the interim income, though the only gift is in a direction to pay at a future time.

Therefore, where, under a power of appointment over a fund, a testatrix directed the trustees, immediately after her death, to raise £5000, and to pay the same equally

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taining that age, or being married, which should first happen, with benefit of survivorship between such five children in case of the death of any one or more of them being a son or sons under the age of twenty-one years, or being a daughter or daughters under that age without having been married. And upon trust, out of the interest and annual income arising from the residue of the said trust funds and premises, to pay certain annuities; and, subject to the payment of such annuities, upon trust to pay the whole of the income arising from the said trust funds and premises unto her husband *James Wolfe Murray* for life, and immediately after his decease to pay and divide the principal of the said trust funds and premises equally between all her children by her said husband, except an eldest or only son, living at the time of her decease, the shares of sons and daughters to vest at twenty-one, and twenty-one or marriage respectively, with benefit of survivorship among the said younger children in case of the death of any before attaining a vested interest; and in case all the younger children should die without having attained a vested interest, then in trust for such eldest or only son; and in case of the death of all her children in her lifetime, then in trust for the said five nephews and nieces, to vest in and be payable to them in the same manner and with the like benefit of survivorship as thereinbefore directed with respect to the £5000 bequeathed to them.

The testatrix died in 1857, and this Bill was filed by the five nephews and nieces (all infants), to obtain a declaration of their rights in a sum of £5000, which had been set apart to answer the bequest.

Argument.

Mr. Springall Thompson for the Plaintiffs:—

It is clear that the gift of the £5000 creates a vested

interest, the payment only being postponed: *Chaffers v. Abell* (a), *Williams v. Clark* (b).

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Even where there is no gift except in the direction to pay, a survivorship clause is sufficient to make it vested:—*Smither v. Willock* (c); and the separation of the legacy is also sufficient: *Saunders v. Vautier* (d), *Boddy v. Dawes* (e). That being so, it follows that interest attaches. Specific legacies carry interest, although the enjoyment may be postponed. The contrary rule applies only to pecuniary legacies: *Acherley v. Wheeler* (f), *Tyrrell v. Tyrrell* (g).

Finally, if interest is not held to be payable, there is an intestacy pro tanto.

Mr. Woodhouse for the husband:—

The gifts are not vested until the age is attained, the postponement being on account of the position of the legatees: *Rennett's Trusts* (h), *Hart's Trusts* (i), *Watson v. Hayes* (k): and at any rate the interim income goes to the husband, notwithstanding the alleged severance of the £5000 by force of the word residue, which sweeps in everything: *Festing v. Allen* (l).

Mr. C. Parke for the testatrix's children:—

Supposing the gift to be vested, I submit, that where legacies are vested, payable in futuro, they do not carry interest. This is a universal rule, not confined to pecuniary legacies, and only departed from where a special intention to allow interest is manifested, or where the postponement of payment is the act, not of the testator, but of the law. In the case of a simple legacy to an infant, the law postpones payment, and interest runs. Where the testator

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| (a) 3 Jur. 577. | (f) 1 P. Wms. 783. |
| (b) 4 D. G. & S. 472. | (g) 4 Ves. 1. |
| (c) 9 Ves. 233. | (h) 3 K. & J. 280. |
| (d) Cr. & Ph. 240. | (i) 3 D. G. & J. 195. |
| (e) 1 Keen, 362. | (k) 5 My. & Cr. 125. |
| (l) 5 Hare, 573. | |

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himself postpones the payment till majority, no interest runs in the meantime. It may be said, that such a direction by a testator is mere surplusage, as the law would effect the same end; and that, being surplusage, it must be rejected, and the case treated as one of postponement by the law. But that this is not so appears from the case cited on the other side of *Tyrrell v. Tyrrell*.

The principle clearly applies as much to specific as to pecuniary legacies: *Bristow v. Bristow* (a).

Moreover, this is not a specific but a demonstrative legacy. The severance of the fund is relied on, but in truth the will does not contemplate immediate severance, and, if it did, that alone would not be conclusive. Then the gift of residue does not carry the undisposed of income to the first taker, but it must be invested as part of the capital of the residue, the income of the investment only going to the tenant for life: *Howe v. Lord Dartmouth* (b), *Holgate v. Jennings* (c), *Crawley v. Crawley* (d); therefore, either as a contingent legacy, or as a vested postponed legacy, subject to the ordinary rule as to interest, this gift does not carry interest.

[He also cited *Taylor v. Frobisher* (e), *Wilmot v. Wilmot* (f), *Harries' Trusts* (g), *Cambridge v. Rous* (h).]

Mr. Hemings for other Defendants.

Mr. Thompson in reply.—There are ample special circumstances, if they are needed, to make the gift carry interest. There is a clear severance of the fund, and there would be an intestacy if interest were not allowed, for the residue clearly does not include the income under the words of this will, but means only the whole property less the £5000. There is no residuary gift in the proper sense of the word.

(a) 5 Beav. 289.
 (b) 7 Ves. 137.
 (c) 24 Beav. 623.
 (d) 7 Sim. 427.

(e) 5 D. G. & S. 191.
 (f) 8 Ves. 10.
 (g) Johns. 199.
 (h) 8 Ves. 12.

Hart's Trusts does not touch the case, as there is no intention here to appoint the whole strictly as residue.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

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This case (which was extremely well argued on both sides) raises a question on the construction of a will made by Mrs. *Wolfe Murray* by virtue of a power. The power which was created by the will of the Duchess of *Leeds*, enabled Mrs. *Wolfe Murray*, the testatrix, in the events that happened, to appoint by will the residuary estate of the Duchess, subject to the interest of Lady *Catherine Melville* in one-third of the income during certain lives. Mrs. *Murray*, by her will, after reciting the power, directs the trustees of the Duchess of *Leeds* to hold the fund upon trust, to raise £5000, and to pay the same equally between the five children of her sister, the shares of such of them as were sons to be paid to them on their respectively attaining the age of twenty-one years, and the shares of such of them as were daughters to be paid to them on their respectively attaining that age or being married, with a clause of survivorship; then upon trust, out of the income of the residue, to pay certain annuities; and subject to the payment of such annuities, upon trust to pay the whole income to testatrix's husband for life; and after his decease to pay and divide the principal "of the said trust funds" (it is to be observed, that she does not use the word residue,) equally between all her children by her said husband, except an eldest son.

There is a gift over to the eldest son on the death of all the younger children without attaining a vested interest, but no gift over on the death of all the children, except in the event of their dying in the testatrix's lifetime, in which

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case it is to go to the nephews and nieces in the same manner as the £5000.

The first question was, whether or not the £5000 was a vested interest in the nephews and nieces, and, if so, then what must be done with the income accrued thereon during their minorities ; or whether the general rule as to legacies would prevent interest running until the period when one of the shares would be payable ? A subordinate question arose, whether, supposing the income not to be otherwise disposed of, it would form part of the general residue as a fund to be capitalised, or whether the whole would go as income to the tenant for life.

The whole scheme of the will seems to be this : the £5000 is to be raised, and paid equally among the five nephews and nieces ; and then at the end of the will is added a clause which carries the residue, in the event of all the testatrix's children dying in her lifetime, to the nephews and nieces, in the same manner as the £5000.

The testatrix does not give £1000 to each of her nephews and nieces at twenty-one or marriage ; but she takes out of the whole fund the sum of £5000, then directs that it is to be paid to the nephews and nieces equally ; and then goes on to specify the times of payment. It is not unimportant to observe, that the whole is taken out in mass, and that the direction as to the time of payment is in a subsequent branch of the sentence. After all this, the residue is given for the benefit of the testatrix's own family. I am of opinion, therefore, that she intended to make a complete and immediate separation of the two funds.

There is no doubt that if this had been the case of a simple legacy, payable at twenty-one or marriage, as distinguished from residue, it would not carry interest ; but here the direction is given to the trustees of the Duchess of *Leeds*' will, and, as was observed by Lord *Cottenham* in *Saunders v. Vautier*,

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deuts say, the property of the Company might have been taken in execution; but any attempt to do so would have raised this whole question. You cannot take the money of the Company to pay the costs due from the directors only. [The VICE CHANCELLOR.—Does it appear that any of these Marine Policies were effected after these gentlemen were appointed solicitors?]

Sir *Hugh Cairns*.—The Petition says, and it is not denied, that this business was continued down to the dissolution of the Company. The marine business was not commenced till 1857, and the date of the appointment of these solicitors is Oct. 1858.

But even suppose that all the business had been done before their appointment, they knew that that business was ultra vires; and when the actions were brought, they should have relied on that defense without going into the merits.

Suppose that trust moneys are invested in the purchase of a leasehold house, and that an ejectment on the title is successfully defended by the solicitor to the trust, and then the cestui que trust repudiates the house, and requires the trust moneys to be restored, the solicitor will not have any claim for the costs of the action as against the cestui que trust.

So in this case, these costs are a personal claim against the directors, and ought to be disallowed against the Company.

VICE CHANCELLOR SIR W. PAGE WOOD:—

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The question in this case is, whether certain bills of costs incurred by the directors of the *Phoenix Life Assurance Company* ought to be allowed against the Company.

(off) could not have recovered back the money: *Lewis v. Samuel* (a).

As to the costs of the Petition: much less than one-sixth was taxed off the bill; therefore the Company must pay them. Even if you strike the marine costs out of the bill altogether the sums disallowed (ultra those costs) do not amount to one-sixth of the rest of the bill.

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Sir *Hugh Cairns* in reply:—

It is our Petition: we must in any case have come to the Court, and we do not ask for these costs.

On the main question, if I am right, one principle will govern the whole case.

What is the true position, what are the rights and duties of solicitors to a trust?

These gentlemen are not the solicitors of the directors but of the Company, for which the directors are but the trustees, and therefore it is that they have a lien on the trust funds; how can that lien extend to costs incurred in respect of a deliberate breach of trust? So long as the trustee acts within the scope of his authority, the solicitor has a lien on the trust fund for all he does, but the moment that authority is exceeded the lien is gone.

In the case of *The Awa* the directors had become liable to replace the money improperly paid out of the Company's funds, and the sum recovered in the action was therefore recovered for their benefit, not for that of the Company.

[The VICE CHANCELLOR.—They might have taken their costs out of the fund recovered before handing it back.]

Sir *Hugh Cairns*.—Yes; but the instant they parted with it that right was gone.

Then as to the actions that were defended: the Respon-

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ment of a claim which could not have been recovered by action (a). In *Wright v. Laving* the action was for a penalty for taking usurious interest, and it was attempted to appropriate the payment to the usurious transaction as against the payee; and the Court refused to allow that to be done where there was a legal debt to which the payee could appropriate it. That is a very different case from this.

[The VICE CHANCELLOR.—Can a solicitor, knowing that he has a claim which he cannot support against the Company, and also a claim which is well founded, appropriate to the payment of the former claim a sum of money paid to him out of the Company's funds by the Directors, who are the parties really liable to pay that claim, even where the directors have attempted specifically to appropriate the payment thereto? Does not he thereby become party to a breach of trust?]

Mr. Smith.—It is submitted that he can do so if it be admitted that the Company (supposing there had been no other debt due from them so as to exclude the idea of set item motam.

In a late case, where a petition was presented by a London Solicitor for the purpose of obtaining a charge under the provisions of the Solicitors' Act (23 & 24 Vict. c. 127, s. 28), on so much of the fund in court in the suit as belonged to his country client, the Petitioner claimed to be entitled to appropriate various payments which had been made to him on account of his agency bills generally, to the items in those bills which were in respect of other suits than the one in question, so as to leave all the costs incurred in that suit as a charge on the fund in court: but the Court refused to allow such appropriation, and directed the account to be taken on the principle of applying the said payments in discharge of the earlier items in the bills in question in order of their date:—*Tardrew v. Howell*, Vice-Chancellor *Stuart*, 8th Nov, 1861. *Rep. i. MSS.*

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these actions were brought were or not within the proper scope of the Company's business; the actions must have been defended, otherwise there would have been judgment and execution against the Company. The directors were, therefore, justified in defending these actions (and their retainer of these solicitors is admitted), and the only ground of objection to the allowance of these costs is, that it is said that the solicitors were guilty of negligence in not pleading that the business out of which the causes of action arose was ultra vires. But to plead this against the wish of the directors, and to the certain ruin of the Company's credit, would have been a breach of duty on their part; therefore the omission to do so cannot be said to be negligence.

It was not clear that the defence, if taken, would have succeeded.

[THE VICE-CHANCELLOR.—It is clear on the face of the deed that marine business is ultra vires; the question would have been—"Was that cured by the supplemental deed?"]

Mr. Smith.—There would have been also a question as to acquiescence.

At any rate we are entitled to appropriate to the payment of these questioned costs the sums which have been paid to us by the Company and not specifically appropriated. Suppose these sums had been paid expressly on account of the marine costs, the Company could not have recovered them back. Such costs were, therefore, a proper object of appropriation, the distinction being that you cannot appropriate a general payment to a claim, where a payment made expressly in discharge of such claim could be recovered back; but where that is not the case, if the payee does not appropriate the payment at the time, the payee may do so at any time afterwards: *Philpot v. Jones* (a): even to the pay-

(a) 2 A. & E. 41.

Mr. Kay, for the creditors' representative.

[Mr. Willcock objected to the creditors' representative being heard; but the Vice-Chancellor overruled the objection on the ground that there might be a question whether, supposing these costs to be payable, they could be claimed in priority to the general body of creditors.]

Mr. Kay.—The directors themselves had no power to pledge the deeds; and therefore they could not, by handing them to the solicitors, do that indirectly which they could not have done directly. *Arnold v. Mayor, &c., of Poole (a)*. As to the marine business, the costs are irrecoverable, and therefore no lien can attach. They knew when they undertook the business that it was unlawful: *Ryan's v. Ryan's (b)*. The cash account shows a number of payments on account of the marine business: these cannot be allowed.

[The VICE-CHANCELLOR.—The questions which arise on the cash account are not before me now. The only point I have to decide is, whether this charge of £997 1s. 1d. for the costs of the marine business is sustainable against the Company.]

Mr. Willcock, Q.C., and Mr. Archibald Smith, for Messrs. *Howard & Dollman*:—

The case of the action by the Company may be considered separately from those against the Company.

This case actually resulted in a gain to the Company; and it is impossible to say that they are to reap the benefit of this action without paying the costs.

Then, as to the cases in which the Company was Defendant.

It is immaterial whether the matters in respect of which

(a) 4 M. & Cr. 860.

(b) 5 D. M. G. 108.

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1863.
The Phoenix
Life Assurance
Company,
Limited,
London and
York.
DOLLMAN'S
CASE.
Argument.

1863.
 Re PRINCE
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 ANCE COM-
 PANY.
 HOWARD AND
 DOLMAN'S
 CASE.
Argument.

Mr. Kay, for

[Mr. Willcock

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Mr. Kay.—The directors themselves had no power to
 pledge the deeds; and therefore they could not, by handing
 them to the solicitors, do that indirectly which they could not
 have done directly. *Arnold v. Mayor, &c., of Poole (a)*. As
 to the marine business, the costs are irrecoverable, and there-
 fore no lien can attach. They knew when they undertook
 the business that it was unlawful: *Ryan v. Ryan (b)*.
 The cash account shows a number of payments on account
 of the marine business: these cannot be allowed.

[The VICE-CHANCELLOR.—The questions which arise on
 the cash account are not before me now. The only point I
 have to decide is, whether this charge of £997 1s. 1d. for
 the costs of the marine business is sustainable against the
 Company.]

Mr. Willcock, Q.C., and Mr. Archibald Smith, for
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Then, as to the cases in which the Company was De-
 fendant.

It is immaterial whether the matters in respect of which

(a) 4 M. & Gr. 860.

(b) 5 D. M. G. 108.

1863.
The Phoenix
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Company
Limited
Statement.

give up the documents in their possession on payment of the rest of the sum certified.

The Respondents, on the other hand, contended—

1. That they were entitled to a lien on the documents for the whole £2448 11s. 2d.

2. That, as regards the costs of the actions Nos. 1 and 4 respectively, they were entitled to special charges on the sums of £191 10s. and £170 respectively "recovered or preserved" in such actions.

3. That they were entitled to appropriate the general payments to the costs (if any) which they could not recover. The case was adjourned from Chambers into Court.

Mr. Fry (Sir Hugh Cairns, Q.C., with him), for the official manager:—

These marine costs should be disallowed.

A general retainer does not authorise solicitors to bring actions, and they never were properly authorised to do so in any of these instances—not by the directors, for they had no power to do so; not by the Company, for there are no retainers under the common seal.

Even if they were properly authorised to defend the actions brought against the Company, they were guilty of negligence in not pleading that the policies were void as *ultra vires*.

On the point of appropriation.—No appropriation having been specifically made by either party ante litem motam, the law will appropriate the payments to the costs properly payable, not to those irrecoverable. *Wright v. Loring* (a).

(a) 3 B. & C. 165.

1863.
 THE PHENIX
 LIFE ASSUR-
 ANCE COM-
 PANY.
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 DOLLMAN'S
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It appeared that these costs were incurred in the follow-
 ing cases, and under the following circumstances:—

1. *The Awa*. This vessel was run down by a Queen's
 ship. The Company paid £200, the amount at which she
 had been insured, but afterwards, on the owners being paid
 compensation by the Government, they brought an action
 to compel the return of the money, and recovered £191 10s.

2. *The Athena*. *Falk v. The Company*. In these cases
 the Company had successfully resisted actions on the re-
 spective policies.

3. *The Marino*. These actions were defended to gain
 time, and protect the goods of the Company from execution.
 4. *Broughtons v. The Company*. This action resulted
 in a compromise. The Company had paid £1,000 into
 court, and £170, part thereof, was paid out again to them.

5. *Noley v. The Company*. This action was at first
 bona fide defended, but a dissolution of the Company being
 imminent, judgment was eventually suffered by default.

6. *Walker v. The Company*. This case resulted in a
 compromise.

It also appeared that considerable sums, the amount of
 which was not stated, had been from time to time paid by
 the Company to the Respondents on account of their bills
 generally.

Under these circumstances, the official manager con-
 tended that the £997 *is. 1d.* ought to be wholly dis-
 allowed, and that the Respondents ought to be ordered to

1863.
 RE FRANKLIN
 LIFE ASSUR-
 ANCE COM-
 PANY.
 HOWARD AND
 DOLMAN'S
 CASE.
 Statement.

and the shareholders thereof, their respective heirs, executors, administrators, and assigns;" and that every person who should thereafter become a shareholder in the Company should "execute a deed containing a covenant on his part to observe and perform" that supplementary deed; and the several departments of business then carried on by the directors of the Company, including the marine business, were thereby sanctioned and confirmed, and power was given to the directors to discontinue any branch if and when they thought fit.

The Company continued to act as a marine company until it was wound up; and it was in the course of such business involved in a considerable amount of litigation.

On the 4th of April, 1861, an order was made for winding up the Company, and the present Petitioner was duly appointed official manager thereof.

The Petitioner applied to the Respondents to hand over to him the deeds and documents in their possession belonging to the Company; but they refused, setting up a lien thereon for costs.

Thereupon this Petition was presented as a special Petition for the delivery and taxation of the Respondents' bill of costs in the matter, and praying, that, if necessary, special directions might be given as to the costs claimed in respect of the marine business.

By the order made upon the original hearing of the Petition, dated the 20th of April, 1861, it was ordered, that the Respondents should deliver their bills of costs within a month, and that such bills should be referred for taxation in the usual way; and the Taxing Master was "to distinguish the costs incurred in respect of the marine insurance business;" and the usual consequential directions were given.

The bills were accordingly delivered, amounting to

"And also, the granting or effecting assurances on live and dead stock, and generally the carrying on the business of a cattle insurance office.

"And also, the granting or effecting assurances against loss or damage to property of any kind whatsoever, and wheresoever situated, by lightning, hailstones, hurricane, blight, or any other causes, means, or contingency.

"All which different heads of business shall, if the directors think fit, be classified and arranged by them in such manner and under such names as they think proper, and so as to cause, if they shall think proper, the business of each department to be kept distinct from the business of the others."

On the 22nd of October, 1858, it was resolved, at a board meeting of the directors, to discontinue the services of their then solicitors, and to appoint others; and accordingly, by a resolution of the board of directors, dated on that day, and sealed with the seal of the Company, Messrs. *Howard & Dollman*, the present Respondents, were appointed solicitors to the Company, at a fixed salary, 'in lieu of charges for attendance at the board, and general advice to the office;' but it was admitted, that such salary did not extend to costs of litigation.

Shortly after such appointment, the Respondents caused a supplemental deed of settlement to be prepared, for the purpose of giving full effect to the resolutions hereinbefore set forth.

By this deed, which is dated the 31st of March, 1859, and made between the shareholders other than the directors of the one part, and the directors of the other part, and which was in fact executed by several of the shareholders, the resolutions of the meeting of the 27th of May, 1857, were recited; and the various parties thereto mutually covenanted that the said resolutions should be "confirmed and declared to have been and be binding on the Company

1863.
 The Phoenix
 Life Assurance
 Company.
 Messrs. Howard and
 Dollman's
 Case.
 Statement.

1863. July 27th, 28th. THE PHENIX LIFE ASSURANCE COMPANY.

Bolton and Client—Company—Vires—Lien—Costs. Where the Directors of a joint stock company was a joint stock company, incorporated under the provisions of the "Joint Stock Companies Act." (a) The deed of settlement was dated the 5th of May, 1848, and defined the business of the company to be "to grant assurances upon lives, endowments, and annuities, and to lend moneys, and to receive deposits and investments of money, and to grant debentures for securing the repayment thereof."

The said deed did not contain any power to alter or enlarge the constitution of the Company. At an extraordinary general meeting of the Company, holden on the 11th of March, 1857, it was resolved to undertake the business of a Marine Insurance Company. At an extraordinary general meeting of the Company, holden on the 27th of May, 1857, it was resolved that the business of the Company should extend to and include the following objects:—

"The granting or effecting assurances against death, or injury, casualty, or accident by sea or land, and generally the transacting of all the business of a casualty or accidental assurance society. And also, the granting or effecting assurances or guarantees for the faithful discharge of their duties by receivers, agents, &c.; and generally the carrying on the business of a guarantee and commercial credit society.

(a) 7 & 8 Vict. c. 110. And where, in such a case, moneys have been paid by the Company to the solicitors on the account of the costs generally, the solicitors have no right to post item money to the Court will appropriate the payments to the costs which the Company was liable to pay.

1863.
DUNDAS
 VOL. 2.
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Judgment.

until the legatee had attained the age of twenty-four." These remarks strike me as very applicable to the present case. The £5000 is to be raised immediately on the death. The trustees are to take it immediately after the death. There is no disposition other than that for the nephews and nieces. The fund is separated without any interest in remainder.

"The true distinction in such a case is, I think, supplied by *Festing v. Allen* (a), where Vice-Chancellor *Wigram*, referring to *Saunders v. Vautier*, says: "It is impossible to hold that the mere necessity of making such a severance in some events only, (as in the case of residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable."

"The mere fact of the fund being severed, is not the essential point. It must be a severance connected with the legacy itself. Here the £5000 is given in one mass to the same trustees who hold the residue, to be converted instantly; and then the testatrix goes on to deal only with what remains of the fund. I am of opinion, therefore, that this was a vested interest; and not only so, but that it was to be severed for the benefit of the objects of the gift, and that the Plaintiffs are consequently entitled to the intermediate income.

Minutes.

DECLARE, that, according to the true construction of the will, the £5000 was thereby appointed to be held by the trustees of the fund in trust for the benefit of the Plaintiffs immediately on the decease of the testatrix, and that the respective shares of the five Plaintiffs became vested in them respectively on the death of the testatrix, subject to be divested in the events in the will mentioned; and that the Plaintiffs are in the meantime entitled to the income arising from their respective shares.

(a) 5 Hare, 578.

THE PRINCE
 LIFE ASSUR-
 ANCE COM-
 PANY.
 HOWARD AND
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 CASE.
 Argument.

1863.

off) could not have recovered back the money: *Lewis v. Samuel* (a).
 As to the costs of the Petition: much less than one-sixth was taxed off the bill; therefore the Company must pay them. Even if you strike the marine costs out of the bill altogether the sums disallowed (ultra those costs) do not amount to one-sixth of the rest of the bill.

Sir Hugh Cairns in reply:—

It is our Petition: we must in any case have come to the Court, and we do not ask for these costs.
 On the main question, if I am right, one principle will govern the whole case.

What is the true position, what are the rights and duties of solicitors to a trust?

These gentlemen are not the solicitors of the directors but of the Company, for which the directors are but the trustees, and therefore it is that they have a lien on the trust funds; how can that lien extend to costs incurred in respect of a deliberate breach of trust? So long as the trustee acts within the scope of his authority, the solicitor has a lien on the trust fund for all he does, but the moment that authority is exceeded the lien is gone.

In the case of *The Ava* the directors had become liable to replace the money improperly paid out of the Company's funds, and the sum recovered in the action was therefore recovered for their benefit, not for that of the Company.

[The VICE CHANCELLOR.—They might have taken their costs out of the fund recovered before handing it back.]

Sir Hugh Cairns.—Yes; but the instant they parted with it that right was gone.

Then as to the actions that were defended: the Respon-

(a) 8 Q. B. 685.

1863.
 THE PHENIX
 LIFE ASSUR-
 ANCE COM-
 PANY.
 HOWARD AND
 DOLLMAN'S
 CASE.
 —
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ment of a claim which could not have been recovered by action (a).

In *Wright v. Laving* the action was for a penalty for taking usurious interest, and it was attempted to appropriate the payment to the usurious transaction as against the payee; and the Court refused to allow that to be done where there was a legal debt to which the payee could appropriate it. That is a very different case from this.

[The VICE CHANCELLOR.—Can a solicitor, knowing that he has a claim which he cannot support against the Company, and also a claim which is well founded, appropriate to the payment of the former claim a sum of money paid to him out of the Company's funds by the Directors, who are the parties really liable to pay that claim, even where the directors have attempted specifically to appropriate the payment thereto? Does not he thereby become party to a breach of trust?]

Mr. *Smith*.—It is submitted that he can do so if it be admitted that the Company (supposing there had been no other debt due from them so as to exclude the idea of set item motam.

In a late case, where a petition was presented by a London Solicitor for the purpose of obtaining a charge under the provisions of the

Solicitors' Act (23 & 24 Vict. c. 127, s. 28), on so much of the fund in court in the suit as belonged to his country client, the Petitioner claimed to be entitled to appropriate various payments which had been made to him on account of his agency bills generally, to the items in those bills which were in respect of other suits than the one in question, so as to leave all the costs incurred in that suit as a charge on the fund in court: but the Court refused to allow such appropriation, and directed the account to be taken on the principle of applying the said payments in discharge of the earlier items in the bills in question in order of their date:—*Tordrew v. Howell*, Vice-Chancellor *Stuart*, 8th Nov, 1861. *Rep's MSS.*

1863.
The Phoenix
Life Assurance
Company
v. Howard and
Dolan's
Case.
Argument.

these actions were brought were or not within the proper scope of the Company's business; the actions must have been defended, otherwise there would have been judgment and execution against the Company. The directors were, therefore, justified in defending these actions (and their retainer of these solicitors is admitted), and the only ground of objection to the allowance of these costs is, that it is said that the solicitors were guilty of negligence in not pleading that the business out of which the causes of action arose was ultra vires. But to plead this against the wish of the directors, and to the certain ruin of the Company's credit, would have been a breach of duty on their part; therefore the omission to do so cannot be said to be negligence.

It was not clear that the defence, if taken, would have succeeded.

[The VICE-CHANCELLOR.—It is clear on the face of the deed that marine business is ultra vires; the question would have been—"Was that cured by the supplemental deed?"]

Mr. Smith.—There would have been also a question as to acquiescence.

At any rate we are entitled to appropriate to the payment of these questioned costs the sums which have been paid to us by the Company and not specifically appropriated. Suppose these sums had been paid expressly on account of the marine costs, the Company could not have recovered them back. Such costs were, therefore, a proper object of appropriation, the distinction being that you cannot appropriate a general payment to a claim, where a payment made expressly in discharge of such claim could be recovered back; but where that is not the case, if the payee does not appropriate the payment at the time, the payee may do so at any time afterwards: *Philpot v. Jones*(a); even to the pay-

(a) 2 A. & E. 41.

1863.
 RE DIVIDEND
 LIFE ASSUR-
 ANCE COM-
 PANY.
 HOWARD AND
 DOLLMAN'S
 CASE.
 Argument.

[Mr. Willcock objected to the creditors' representative being heard; but the Vice-Chancellor overruled the objection on the ground that there might be a question whether, supposing these costs to be payable, they could be claimed in priority to the general body of creditors.]

Mr. Kay, for the creditors' representative.

Mr. Kay.—The directors themselves had no power to pledge the deeds; and therefore they could not, by handing them to the solicitors, do that indirectly which they could not have done directly. *Arnold v. Mayor, &c., of Poole (a)*. As to the marine business, the costs are irrecoverable, and therefore no lien can attach. They knew when they undertook the business that it was unlawful: *Kynnis v. Kynnis (b)*. The cash account shows a number of payments on account of the marine business: these cannot be allowed.

[The VICE-CHANCELLOR.—The questions which arise on the cash account are not before me now. The only point I have to decide is, whether this charge of £997 1s. 1d. for the costs of the marine business is sustainable against the Company.]

Mr. Willcock, Q.C., and Mr. Archibald Smith, for Messrs. *Howard & Dollman*:—

The case of the action by the Company may be considered separately from those against the Company.

This case actually resulted in a gain to the Company; and it is impossible to say that they are to reap the benefit of this action without paying the costs.

Then, as to the cases in which the Company was Defendant.

It is immaterial whether the matters in respect of which

(a) 4 M. & Cr. 860.

(b) 5 D. M. G. 108.

1863.
 The Phoenix
 Life Assur-
 ance Com-
 pany.
 Howard and
 Doulman's
 Case.
 Statement.

give up the documents in their possession on payment of the rest of the sum certified.

The Respondents, on the other hand, contended—

1. That they were entitled to a lien on the documents for the whole £2448 11s. 2d.

2. That, as regards the costs of the actions Nos. 1 and 4 respectively, they were entitled to special charges on the sums of £191 10s. and £170 respectively "recovered or preserved" in such actions.

3. That they were entitled to appropriate the general payments to the costs (if any) which they could not recover. The case was adjourned from Chambers into Court.

Mr. Fry (Sir Hugh Cairns, Q.C., with him), for the official manager:—

These marine costs should be disallowed.

A general retainer does not authorise solicitors to bring actions, and they never were properly authorised to do so in any of these instances—not by the directors, for they had no power to do so; not by the Company, for there are no retainers under the common seal.

Even if they were properly authorised to defend the actions brought against the Company, they were guilty of negligence in not pleading that the policies were void as ultra vires.

On the point of appropriation.—No appropriation having been specifically made by either party ante litem motam, the law will appropriate the payments to the costs properly payable, not to those irrecoverable. *Wright v. Loring* (a).

(a) 3 B. & C. 165.

£2776 15s. 2d.; and Mr. *Parkes*, by his certificate, filed 14th July, 1863, certified the costs due to Messrs. *Howard & Dollman* at £2448 11s. 2d.; and that the sum of £997 1s. 1d., part thereof, was the amount of costs incurred in respect of marine insurance business.

It appeared that these costs were incurred in the following cases, and under the following circumstances:—

1. *The Ava*. This vessel was run down by a Queen's ship. The Company paid £200, the amount at which she had been insured, but afterwards, on the owners being paid compensation by the Government, they brought an action to compel the return of the money, and recovered £191 10s.

2. *The Athena*. *Ralk v. The Company*. In these cases the Company had successfully resisted actions on the respective policies.

3. *The Marino*. These actions were defended to gain time, and protect the goods of the Company from execution. This action resulted in a compromise. The Company had paid £1,000 into court, and £170, part thereof, was paid out again to them.

5. *Nolley v. The Company*. This action was at first bona fide defended, but a dissolution of the Company being imminent, judgment was eventually suffered by default.

6. *Walker v. The Company*. This case resulted in a compromise.

It also appeared that considerable sums, the amount of which was not stated, had been from time to time paid by the Company to the Respondents on account of their bills generally.

Under these circumstances, the official manager concluded that the £997 1s. 1d. ought to be wholly disallowed, and that the Respondents ought to be ordered to

1863.
 RE FRANKLIN
 LIFE ASSURANCE COMPANY.
 HOWARD AND DOLLMAN'S CASH STATEMENT.

1863.
 RE PHOENIX
 LIFE ASSUR-
 ANCE COM-
 PANY.
 HOWARD AND
 DOLLMAN'S
 CASE.
 Statement.

and the shareholders thereof, their respective heirs, executors, administrators, and assigns;" and that every person who should thereafter become a shareholder in the Company should "execute a deed containing a covenant on his part to observe and perform" that supplementary deed; and the several departments of business then carried on by the directors of the Company, including the marine business, were thereby sanctioned and confirmed, and power was given to the directors to discontinue any branch if and when they thought fit.

The Company continued to act as a marine company until it was wound up; and it was in the course of such business involved in a considerable amount of litigation.

On the 4th of April, 1861, an order was made for winding up the Company, and the present Petitioner was duly appointed official manager thereof.

The Petitioner applied to the Respondents to hand over to him the deeds and documents in their possession belonging to the Company; but they refused, setting up a lien thereon for costs.

Thereupon this Petition was presented as a special Petition for the delivery and taxation of the Respondents' bill of costs in the matter, and praying, that, if necessary, special directions might be given as to the costs claimed in respect of the marine business.

By the order made upon the original hearing of the Petition, dated the 20th of April, 1861, it was ordered, that the Respondents should deliver their bills of costs within a month, and that such bills should be referred for taxation in the usual way; and the Taxing Master was "to distinguish the costs incurred in respect of the marine insurance business;" and the usual consequential directions were given.

The bills were accordingly delivered, amounting to

"And also, the granting or effecting assurances on live and dead stock, and generally the carrying on the business of a cattle insurance office.

"And also, the granting or effecting assurances against loss or damage to property of any kind whatsoever, and wheresoever situate, by lightning, hailstones, hurricane, blight, or any other causes, means, or contingency.

"All which different heads of business shall, if the directors think fit, be classified and arranged by them in such manner and under such names as they think proper, and so as to cause, if they shall think proper, the business of each department to be kept distinct from the business of the others."

On the 22nd of October, 1858, it was resolved, at a board meeting of the directors, to discontinue the services of their then solicitors, and to appoint others; and accordingly, by a resolution of the board of directors, dated on that day, and sealed with the seal of the Company, Messrs. *Howard & Dollman*, the present Respondents, were appointed solicitors to the Company, at a fixed salary, in lieu of charges for attendance at the board, and general advice to the office; but it was admitted, that such salary did not extend to costs of litigation.

Shortly after such appointment, the Respondents caused a supplemental deed of settlement to be prepared, for the purpose of giving full effect to the resolutions hereinbefore set forth.

By this deed, which is dated the 31st of March, 1859, and made between the shareholders other than the directors of the one part, and the directors of the other part, and which was in fact executed by several of the shareholders, the resolutions of the meeting of the 27th of May, 1857, were recited; and the various parties thereto mutually covenanted that the said resolutions should be "confirmed and declared to have been and be binding on the Company

1863.
 THE PHOENIX
 LIFE ASSURANCE COMPANY,
 LONDON.
 HOWARD AND
 DOLLMAN'S
 CASE.
 Statement.

1863.
July 27th, 28th.

THE PHENIX LIFE ASSURANCE COMPANY.

HOWARD AND DOLTMAN'S CASE.

THIS was the further hearing of a Petition for the delivery and taxation of a bill of costs.

Solicitor and
Client—Com-
pany—Ultra-
vires—Lien—
Costs.

The *Phoenix Life Assurance Company* was a joint stock company, incorporated under the provisions of the "Joint Stock Companies Act." (a) The deed of settlement was dated the 5th of May, 1848, and defined the business of the Company to be "to grant assurances upon lives, endow-ments, and annuities, and to lend moneys, and to receive deposits and investments of money, and to grant debentures for securing the repayment thereof."

The said deed did not contain any power to alter or en-
large the constitution of the Company.

At an extraordinary general meeting of the Company, holden on the 11th of March, 1857, it was resolved to undertake the business of a Marine Insurance Company.

At an extraordinary general meeting of the Company, holden on the 27th of May, 1857, it was resolved that the business of the Company should extend to and include the following objects:—

"The granting or effecting assurances against death, or injury, casualty, or accident by sea or land, and generally the transacting of all the business of a casualty or acci-
dental assurance society.

"And also, the granting or effecting assurances or guar-
antees for the faithful discharge of their duties by re-
ceivers, agents," &c.; and generally the carrying on the
business of a guarantee and commercial credit society.

(a) 7 & 8 Vic. c. 110.

nam to appropriate such payments to the costs incurred in respect of the usual business of the Company, but, on the contrary, the Court will appropriate the payments to the costs which the Company was liable to pay.

1863.
DUNNAN
WOLFE
MURRAY.
Judgment.

until the legatee had attained the age of twenty-four." These remarks strike me as very applicable to the present case. The £5000 is to be raised immediately on the death. The trustees are to take it immediately after the death. There is no disposition other than that for the nephews and nieces. The fund is separated without any interest in remainder.

The true distinction in such a case is, I think, supplied by *Festing v. Allen* (a), where Vice-Chancellor *Wigram*, referring to *Saunders v. Vautier*, says: "It is impossible to hold that the mere necessity of making such a severance in some events only, (as in the case of residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable."

The mere fact of the fund being severed, is not the essential point. It must be a severance connected with the legacy itself. Here the £5000 is given in one mass to the same trustees who hold the residue, to be converted instantly; and then the testatrix goes on to deal only with what remains of the fund. I am of opinion, therefore, that this was a vested interest; and not only so, but that it was to be severed for the benefit of the objects of the gift, and that the Plaintiffs are consequently entitled to the intermediate income.

Miles.

DECEASE, that, according to the true construction of the will, the £5000 was thereby appointed to be held by the trustees of the fund in trust for the benefit of the Plaintiffs immediately on the decease of the testatrix, and that the respective shares of the five Plaintiffs became vested in them respectively on the death of the testatrix, subject to be divested in the events in the will mentioned; and that the Plaintiffs are in the meantime entitled to the income arising from their respective shares.

(a) 5 Hare, 578.

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the same persons are trustees of the general estate and the particular fund; but the fund having been separated for the benefit of the nephews and nieces, the residue is appropriated to other persons. In the first place—the direction is, immediately after the death, to raise,—Then, although there is benefit of survivorship among them, there is no gift over on the failure of all the nephews and nieces. The next thing which occurs to the mind of the testatrix immediately after the bequest is, a trust of the interest and whole income accruing from the residue, clearly showing that she conceived that she had separated the £5000 from the general estate, and tending to shew that she meant to refer to the estate which would remain over and above the £5000. This segregation of a fund has been relied on in many cases besides *Boddy v. Davies*, which was special in its circumstances. *Love v. L'Estrange (a)*, and *Saunders v. Vautier*, shew how far the Court will go in holding an interest vested, when a fund is set apart.

Although *Love v. L'Estrange* is not itself directly in point, we have the principle very strongly laid down by Sir W. Grant, who, in commenting on this case in *Hanson v. Grant (b)*, observes that though the Lord-Chancellor had found it difficult to arrive at the conclusion that the gift was vested otherwise than on the distinction as to a residue, it was not necessary to resort to that, because it was not a simple unqualified gift, but a gift to trustees absolutely, for the benefit of *Walter Nash*, to improve it for his benefit, to transfer the whole to him when he arrived at the specified age, and to make him a certain allowance in the meantime. "That," says Sir W. Grant, "is very different from a simple bequest to him when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death, and must have been paid over to the trustees immediately, and they would have managed it

(a) 5 B. P. C. 59.
 (b) 6 Ves. 248.

The solicitors, to whom the costs in question are due, were appointed, in the month of October, 1858, Solicitors to the Company at a fixed salary, which, however, was not to include any costs of litigation ; and with regard to the claim for costs incurred in respect of the life assurance business no difficulty arises. It is admitted, that these costs are due. With regard to the rest of the claim now before me, I do not mean to lay down any general rule that solicitors of a Company are never entitled to be remunerated for their services where it appears that they have acted in matters beyond the power of the Company ; but I think that the onus of showing in each particular case that they ought to be so remunerated lies upon them.

In the present case, these gentlemen knew that the Company had no power to carry on the business of marine insurance, and they attempted to remedy the defect by procuring the adhesion of the shareholders to a supplemental deed : that failed because the shareholders did not all accede to it : therefore these gentlemen clearly knew not only that the marine insurances were ultra vires, but that the acts of the directors in that respect would not be confirmed. Now, if persons who are trustees for a public body appoint solicitors, these solicitors are not the servants of the directors or trustees who appointed them, but of the Company or Body Corporate ; and it is their duty to advise the Company and directors to adhere to all the rules and regulations of the Company, and not to indulge their own personal views.

There are two classes of actions in which these disputed costs have been incurred.

1st.—The case of *The Ava* where money having been paid to persons who were afterwards compensated for their loss aliunde, the Company brought their action and recovered back the money ; and

2ndly.—The cases where the Company was Defendant to actions brought on marine policies.

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In the latter cases I should not have felt any difficulty in giving these gentlemen their costs, had they met the actions at the outset with a plea of "never indebted:" thus at once freeing the Company from liability, and leaving it to the directors, who alone were really liable, to get out of their personal difficulty as best they could: but this is not what they do; on the contrary, they run up a bill of £400 in the endeavour to ascertain whether or not the insured had been guilty of a fraud, a matter with which the Company had nothing to do. It was their plain duty to tell the directors that they could not act for the Company except in one way, namely, by denying all liability in respect of these insurances; and as they did not choose to take that course, I must hold that they defended these actions on behalf of the directors personally, and disallow these costs as against the Company.

On similar grounds I must consider that the £200 which was recovered in the case of *The Ava* was the money of the directors, not of the Company; that is to say, if it had not been recovered the directors would have been liable to refund it to the Company, and therefore it was recovered for their benefit. These costs also must therefore be disallowed.

Then there is a claim of lien set up, not very distinctly, and not pointed at any specific property. It may be sufficient to say on that point, that, if these gentlemen have any fund in their hands properly chargeable with any debt due to them, they can put in force the usual attorney's lien: I have nothing to say to that; my present concern is merely with these bills of costs, and no part of these disputed charges appears to me to be sustainable.

Then again there is a claim to appropriate to these unauthorised charges certain sums of money paid by the directors to these gentlemen on account of costs generally, and Mr. *Smith* asks, (what I admit to be the proper test in a question of appropriation) "Could this money, sup-

posing it to have been paid expressly on account of these marine costs, have been recovered back?" Not, perhaps, by the directors, but in equity by the Company it certainly could; the money would have been paid in breach of trust, and if you once arrive at this conclusion the solicitors, who ex hypothesi would have been cognizant of such breach, could not have retained it against the claim of the cestuex que trustent.

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I repeat that I do not wish to lay down any general rule that the solicitors of a Company are not justified in defending doubtful actions; but in this case these actions arose in the regular course of proceeding in carrying on a branch of the business which the solicitors knew, and had advised the directors, could not properly be carried on.

I must disallow the costs in question and negative the claim of appropriation.

IN RE HOLDEN.

IN RE THE LONDON AND NORTH WESTERN
RAILWAY COMPANY.

THIS was a petition by *Henry Augustus Holden*, the tenant for life, and *William Rose Holden*, the tenant in tail in remainder, asking for payment to the tenant in tail of a sum of £1394 Consols, representing the purchase money paid into the Bank by the *London and North Western Railway Company* as compensation for part of the entailed estate. No disentailing deed had been executed.

Feb. 2nd.

*Practice—Pay-
ment out of
Court—Tenant
in tail—Dis-
entailing Deed.*

A fund which represented the interest of a tenant in tail in remainder in land taken by a railway company ordered to be paid out of Court to the tenant in tail in remainder with the consent of the tenant for life, without requiring a disentailing deed.

Mr. *Springall Thompson*, for the Plaintiff, submitted, that the stock might be transferred to the tenant in tail, without his being required to execute a disentailing deed in respect of it.

The VICE-CHANCELLOR made the order.

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April 28th.

Charity—
 Mortmain—9
 Geo. 2, c. 36.—
 Assets—Pure
 and impure
 Personality—
 Apportionment.

Where a bequest to a charity fails pro tanto, as being given out of the proceeds of pure and impure personality, the proportion in which the bequest fails is to be ascertained according to the state and value of the assets at the testator's death and not at the time of the apportionment.

Robinson v. The London Hospital (a) corrected.

Argument.

CALVERT v. ARMITAGE.

THIS was a Bill to execute the trusts of the will of *J. Baker*, which, after directing a sum of £6,000 to be raised out of his real and personal estate, limited the same, in the event of the failure of issue of his sons, as to £200 to the Treasurers for the time being of certain charities, and subject thereto over. The only point of interest related to the form of the inquiries for the purpose of apportioning the assets with reference to the charity legacies.

Mr. *James*, Q.C., and Mr. *Turner*, for the Plaintiffs, called the Vice-Chancellor's attention to the direction in *Robinson v. The London Hospital (a)*, that the apportionment should be made according to the values of the pure and impure personality respectively at the time of the apportioning, and not according to the values at the time of the decease of the testator.

Mr. *Little* for the Charities.

Mr. *Osborne*, Q.C., and Mr. *Vaughan Johnson*, for other Defendants interested in the fund, contended that the apportionment should be according to the values at the present time and not at the death of testator.

Mr. *G. L. Russell*, for the widow.

Mr. *Bury*, for other parties.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I cannot discover from the report of *Robinson v. The*

(a) 10 Hare, 19, 29.

London Hospital any special reason for making the order in that shape. I always thought the rule was clearly the other way. According to the report, the decision seems wrong. The rule is as in *Sparling v. Parker*, and *Williams v. Kershaw* (a), that the proportion in which the bequest fails is to be ascertained according to the state and value of the assets at the testator's death and not at the time of apportionment.

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INQUIRY directed accordingly.

Minute.

(a) Cited 5 Seton's Decrees, 176.

1 Law Rep. Ch. app. 195.

BRAHAM v. BUSTARD.

THIS was a motion for an injunction to restrain the Defendants from selling soap under the name of "The Excelsior White Soft Soap," or any name only colourably different therefrom.

The Plaintiffs were soap manufacturers in *London*; and in the course of December, 1862, they introduced into the market a superior kind of white soft soap, which they sold under the name of "The Excelsior White Soft Soap."

It was admitted, that white soft soap as a chemical product had been known for a long time; but it was asserted, and proved, that there was little or no demand for it in the market until after the Plaintiffs had so introduced it as long been in common use as applied to goods of a different kind. And it will make no difference that the Plaintiff has also a trade mark which has not been taken by the Defendant.

Aug. 1st, 3rd.
Trade Mark—
Exclusive Use
of fancy Name
—Injunction.

Where A. introduces into the market an article which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B. will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name in question has

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aforesaid, and that, for commercial purposes, it was then substantially a new article.

The Defendants were manufacturing chemists, carrying on business at *Manchester* under the firm of "*Bustard & Co.*;" and in the course of the month of March, 1863, one Mr. *Prior*, a travelling agent of the Plaintiffs, proposed to the Defendant *Bustard* that he should accept a sub-agency from him (*Prior*) for the sale of this soap. This *Bustard* declined to do.

At some time prior to June, 1863, the Defendants began to manufacture white soft soap, which they brought into the market and sold under the name of "*Bustard & Co's. Excelsior White Soft Soap.*"

Both Plaintiffs and Defendants used their respective names on labels attached to their jars and casks, and on handbills and placards, according to the usual custom in such cases.

In the month of March, 1863, the Plaintiffs adopted a specific trade mark, which they thenceforward introduced into their labels, handbills, &c. This, it was admitted, the Defendants had not attempted to copy.

On the 1st of June, 1863, *Prior* (who was also agent for the Defendants for the sale of other articles) called at their counting house on business connected with such agency, and he then discovered that the Defendants were selling soap under the said name, and he remonstrated with them for doing so.

Prior also swore that he had been informed by several persons who were his customers, that they had been offered "*The Excelsior White Soft Soap*" by agents of the Defendants, and one of these persons (a Mr. *Taylor*) stated that he had believed the person who made the offer to have been a sub-agent of the Plaintiffs sent to him by *Prior*.

On the 17th June, 1863, the Defendants wrote and sent to the Plaintiffs the following letter :—

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" Messrs. *H. J. Braham & Co., London.*

" Gentlemen,

" *June 17th, 1863.*

" We have this day received information which has led us to think you have taken offence at and are trying to bring an action at law against us for making a white soft soap and using the word 'Excelsior' in connection with the same, which occurs on two of our printed labels, one of which reads '*Bustard & Co's. Excelsior White Soft Soap Works, Collyhurst, Manchester,*' the other '*Bustard & Co. (Excelsior) Soft Soap,*' we have also, on our last lot of address cards, amongst other articles we make, used the words 'Excelsior White Soft Soap' on one side, and our address in full on the other side. This is the head and front of our offending. We have no intention to do you any injury whatever, nor never had. The way we got to hear of and commence making a white soft soap is as follows :—*Mr. Prior*, your *Manchester* agent, is an agent of ours also, and has been this last eight months, and in a conversation with our *Mr. Bustard* three months since, after telling him how he was going on with your soap, he offered to give him a sub-agency for the same, and he (*Mr. Prior*) would allow him 5 per cent. on sales. This *Mr. Bustard* declined, stating that he was sure it would not pay to work a totally new thing for such a small commission amongst our connexion. About a month after this, when *Mr. Prior* was again at our place, he tried hard to get *Mr. Bustard* to work a sub-agency from him for the soap; this *Mr. Bustard* declined as before, as it would not pay us; at the same time telling him that he thought he could make what small quantity we could sell. About a month since *Mr. Prior* was again at our place, he saw one of our labels, which

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reads '*Bustard & Co's. Excelsior White Soft Soap Works, Collyhurst, Manchester,*' he then said he thought we ought not to use the word '*Excelsior*;' to which Mr. *Bustard* said he could not see that we were doing them any injury, as we had our name printed before the '*Excelsior*,' but asked him (Mr. *Prior*) to write to you asking the question whether we were right or not, as we would give it up if we were infringing on your rights and privileges. This we are now prepared to do if you think we ought not to use the word; the word cannot do us any good, as it is not at all known by that name. We did not use the word to get any of your trade, or should not have put our own names before it. We have never solicited orders for or sold any soap as the '*Excelsior*,' but simply as a white soft soap, nor have sold £20 of it, as our books shew. We have now stated the case simply and frankly and should like to be met in the same spirit. Your reply will be esteemed by

"Yours &c.,

"BUSTARD & Co."

To this letter the Plaintiffs replied as follows:—

"Messrs. *G. Bustard & Co.*,
 "Gentn.,

"June 18th, 1863.

"Yours of the 17th is before us, contents noted. You are undoubtedly quite correct in what you say. You hear of our intentions to prosecute for an attempt on your part to palm off upon the public an imitation of our *Excelsior White Soft Soap* for the genuine. We fancy there should be some means adopted always to secure owners in the possession of their property, and with this view we have made arrangements for a vigorous prosecution of a suit against yourselves. We are disposed only to protect ourselves and the public against imposi-

tion, and this we feel that we are bound to do. It is quite clear that you propose to reap a benefit from the sale of an imitation that the public through you are induced to accept as the genuine, and thus do us a two-fold injury, by pocketing our rightful money, and by palming off your stuff, which we have before us, for ours. It remains with you to decide our course: either you must cease making anything of the kind, or causing it to be made and sold, or continue your operations with the assurance that you thereby bring upon yourselves a lawsuit, which we will frankly say we would quite as soon have as not. We are induced by the frankness of your letter to be equally frank; and shall await your reply.

"Truly yours, &c.,

"H. J. BRAHAM & Co."

In reply to this letter the Defendants wrote:—

"Messrs. H. G. Braham & Co., London.

"Gentlemen,

"June 19th, 1863.

"Your favor of the 18th to hand. We are sorry to have troubled you with ours of the 17th, having since found that we were needlessly alarmed. You can take what steps you think proper; and in the meantime

"We are, Gentlemen,

"Yours respectfully,

"BUSTARD & Co."

Upon the receipt of this letter the Bill was filed.

The Plaintiffs proved the facts above stated, and that they had had considerable sale for this soap, and that it was well known in the principal towns in the kingdom under the name of "The Excelsior White Soft Soap;" and they swore that, to the best of their belief, the name in question had never been used by any one except themselves and the Defendants.

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The Defendants filed affidavits in opposition to the motion, in which they stated that they did not use in the manufacture any process communicated to them by the Plaintiffs or their agents, and that they did not mean by the use of the word "Excelsior" to claim any connection with the Plaintiffs, but merely to denote the superior quality of their soap. They produced a number of placards and advertisements of all sorts, on which the word "Excelsior" was used as descriptive of all kinds of goods, from sewing machines to steel pens, (none of such goods, however, being soap or of that nature); and they further said that neither their goods nor those of the Plaintiffs had any position in the market of any value, and produced a Mr. Yates, who had acted as their agent for some time, and who said he had been obliged to abandon the attempt to sell "White Soft Soap" in consequence of the want of demand for it.

Argument.

Mr. W. M. James, Q.C., and Mr. E. Charles, for the motion :—

No one ever sold "Excelsior" Soap till we did. The name is a mere fancy name, which we adopted first, and which therefore it is a fraud on us to copy: *Knott v. Morgan* (a), *Croft v. Day* (b). This is not nearly so difficult a case as that of the "warranted" watches (c), and yet there the injunction was granted.

Mr. Rolt, Q.C., and Mr. Lake Russell contra :—

This is a mere puffing case.

A puffing trader naturally wishes to give the impression that his goods are the best in the world; but he must not use words descriptive of quality if he wishes to have the

(a) 2 Keen, 213.

(b) 7 Beav. 85.

(c) *Gout v. Aleploglu*, 6 Beav. 69, n.

exclusive use of them. Excelsior has become as much an *English* word as extra, or superior, and is used as denoting the highest quality of a particular article, ex. gr. *Dufour's Plums*. But we are at liberty to say to the world that our article is better than his.

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There is no evidence that any one was deceived.

[The VICE-CHANCELLOR.—At least one person seems to have been so.]

Mr. *Rolt*.—They might as well have been deceived by Excelsior trowsers, Excelsior matches, &c.

We always used our own name in connection with the word.

This is not a new article. White Soft Soap, though not generally known in the market, has been long known by the trade.

At any rate, when the Plaintiffs adopted their present trade mark, they virtually announced that no goods without that mark were theirs, and we have never attempted to imitate that mark : *Woollam v. Ratchiff* (a).

Mr. *James* in reply :—

Their own evidence is that this is a "totally new article." This is as deliberate an attempt to rob another man of his property as ever was seen.

If "Excelsior" only means "Superfine," they should shew some quality with which to compare it ; but there is none, it is all Excelsior, therefore it is not a mark of quality but a fancy name. In the case referred to it was proved that no one had been in fact deceived.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case is, in some respects, novel ; but I think that the
(a) *Supra*, p. 259.

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principles to be applied to it are sufficiently clear to guide me to a conclusion.

In the first place, it is clear that the Defendants deserve no consideration at the hands of the Court: if they have an abstract right to do what they have done, the Court must permit it, however opposed to one's moral sense, (I held that in the *Prize Medal Case* (a)); but certainly I should not feel at all disposed in their favour.

Now I think it is sufficiently established, that, as an article of commerce, this is a new article; indeed *Bustard & Co.* admit as much in their first letter, and *Yates's* affidavit makes it clear that this is so: then, as a new article, it of course required a name, and accordingly this name was given to it.

We next find that a commission for the sale of this soap was offered to *Bustard & Co.*, but they did not think it worth their while to work on commission; and in their first letter they honestly admit that the first idea they ever had of making white soft soap for the market was from *Prior's* visit. True, they afterwards sought to lead the Court to a different conclusion, but I find this admission (which I consider an honest confession of the fact) in their letter. [His Honour read the letter.]

I had to consider this question in the case of *Young's* Paraffin Oil; and in that case, if the evidence had gone to show that the Plaintiff had been the first to apply the name "Paraffin" to the oil, I should have granted an injunction; but there I had it proved that the name "Paraffin Oil" had long been known as the scientific name of the article, and that the Defendant could not well have called it anything else; just as here the Defendants cannot help calling their article "White Soft Soap." The present

(a) *Batty v. Hill*, supra, p. 264.

Plaintiffs seem to have felt this difficulty, and to have determined on having a name which should specifically denote their manufacture, and nothing else, and accordingly they call it "The Excelsior White Soft Soap."

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The only doubt I have really felt was, whether I could take it as clear that the Plaintiffs' goods, and their goods only, were known in the market by this name; but this is proved by the evidence of *Prior*, and practically by that of *Yates*, and the Defendants do not produce a single witness to say that he knew the article, and that the name "Excelsior" was only taken as an indication of quality.

It is clear on the evidence, that from December to June the Plaintiffs had the sole manufacture of the article called "Excelsior White Soft Soap."

But then it is said that the name is a ridiculous one, and the Court will not interfere to protect it. But though it is true that the Court will not, if it can avoid it, be made the medium of a mere puffing advertisement, still if, as here, the Plaintiffs have a right of sufficient value to induce others to attempt a fraudulent violation of it, the Court will interfere to prevent them from being cheated.

Again the Defendants urge that Excelsior is merely a mark of quality, like "Superfine," or "Superior;" but there seems to me to be a double answer to this:—

In the first place, the Plaintiffs do not sell two or three qualities of soap, calling one of them "excelsior," and the others by some other name; they have only one quality, which they denominate "The Excelsior White Soft Soap," and there is nothing except itself with which to compare it.

But, in the second place, the manner in which, as has been proved, this name is generally used in the market, shows that it is more like such names as "Victoria," "Albert,"

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"Eureka," &c., which are not names of quality, but simply arbitrary designations for sake of distinction.

If the Plaintiffs had issued their soap under the name of Albert White Soft Soap, I should undoubtedly have interfered to prevent anyone else from adopting that name to their prejudice; and here it is proved that the Plaintiffs' goods had undisputed possession of the market for at least six months under the name at present in dispute, and have acquired a reputation under that name.

It was with some regret that I read the Plaintiffs' answer to the first letter of the Defendants; but I cannot treat that letter, little as I approve of its tone, as any justification of the subsequent conduct of the Defendants.

The additional trade mark adopted by the Plaintiffs, in March last, does not, to my mind, affect the question. The name "Conveyance Company" was not a trade mark, and I cannot hold it to be any justification for a Defendant to say "the Plaintiff has two ways of identifying his goods, and I have only stolen one of them."

In the *Sheffield* cases the Defendants had not taken the trade marks (properly so called) of *Rodgers & Son*, and yet this Court granted injunctions to prevent the unauthorised use of Messrs. *Rodgers's* name apart from their trade mark.

If the Defendants had not desired to obtain an unfair advantage of the reputation of the Plaintiffs' goods, they would have called their soap "Victoria White Soft Soap," or "Royal White Soft Soap," or by some similar name. I must grant this injunction.

Minutes of
 Order.

RESTRAIN the Defendants from selling, or advertising, or exposing for sale, any soap under the name of Excelsior White Soft Soap, or any words so contrived as to represent or to lead to the belief that the article sold by the Defendants is the Plaintiffs' article of manufacture.

RE STATE FIRE INSURANCE COMPANY.

aff. 1 Dec. 9. & S. 634.
THIS was an adjourned summons taken out by the official manager of the State Fire Insurance Company, to obtain the direction of the Court as to the distribution of the funds in hand among the different classes of creditors.

The State Fire Insurance Company was constituted under the 7th & 8th Vict. cap. 110, by a deed of settlement, dated the 12th of October, 1854, and executed by the shareholders. The deed contained the following clauses:—

7. The Directors shall form two several funds, to be called respectively the Shareholders' Fund, and the Assurance Fund, and shall keep separate and distinct accounts of such funds, and of the additions and disbursements to and out of the same funds respectively; and the Shareholders' Fund shall be composed of the sums paid by the shareholders, as instalments upon or in respect of the shares taken or held by them in the Company, and of the accumulations thereof, and of the additions made thereto, as hereinafter mentioned; and the Assurance Fund shall be composed of the premiums and other sums received in respect of the assurances effected with the Company, and all other moneys to be received by the Company, and not included in the Shareholders' Fund, and of the increase of the same moneys respectively, by accumulations or otherwise.

8. The shareholders shall be entitled to receive out of the profits of the Company interest after the rate of 5 per cent. on the amount of instalments paid by them, and such interest shall be paid out of the accumulations of the Shareholders' Fund, so far as the same will extend, and the residue of such interest, after exhausting such accumulations, shall be paid out of such of the accumulations of the Assurance Fund as shall not be required for the purpose of providing for the engagements or liabilities of the Company.

passu among all the creditors of the Company, including policy holders, without prejudice to any question as to marshalling. *Re Athenæum*, Johns. 633, qualified.

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May 23rd.

Assurance
 Society—
 Winding-up.

A Fire Insurance Company issued policies, by which the assets of the Company were made liable to pay the amount of loss, with a limitation of the personal liability of shareholders. In other policies the form was, that the assets remaining at the time of the claim undisposed of in pursuance of the deed of settlement, should be liable. The Company had also incurred general debts without any limitation of liability. The Company being in course of winding-up:—

Held, that the claimants under policies had a charge in such a sense as to entitle them to a receiver, but not so as to confer any priority as between themselves, or as against the general creditors; and that the assets in the hands of the Official Manager were distributable pari

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9. All claims on the Company shall be satisfied out of the Assurance Fund, so far as the same will extend, and in case of a temporary deficiency of the Assurance Fund, the same shall be paid out of the Shareholders' Fund; and the last-mentioned Fund shall be reimbursed out of the first moneys which shall afterwards accrue to the Assurance Fund.

10. Previously to the Ordinary General Meeting, to be held in the year 1862, and previously to the Ordinary Meeting to be held in every succeeding seventh year, or at such earlier time, and afterwards at such intervals as a General Meeting shall determine, the Directors shall cause a calculation to be made, by some qualified person, of the amount of clear profits which have, up to the 31st day of December preceding, accrued by accumulation or otherwise to the Assurance Fund, and which can be taken out of the said fund without prejudice to the existing and continuing claims and demands thereon; and it shall be lawful for the next Ordinary General Meeting, by resolution, to direct that the whole, or such part as shall be thought advisable, of such clear profits, shall be taken out of the Assurance Fund, and appropriated and distributed by way of bonus amongst the shareholders and the policy holders, whose policies shall have been in existence for seven years before the date of such General Meeting; and one moiety of the sum to be so appropriated and distributed as aforesaid, shall be added to the Shareholders' Fund, and the remaining moiety of the said sum shall be distributed among such policy holders as aforesaid, in such manner as the Directors shall think fit.

47. The Directors shall, and they are hereby authorised, to make and issue, indorse, and accept, in the name and on account of the Company, such bills of exchange and promissory notes as they think expedient. Provided always, that it shall not be lawful to issue, indorse, or accept an

such notes or bills in any other case, or for any other purpose, than in or for discharging existing claims or liabilities against or upon the Company, or except or otherwise than upon condition that the same shall take effect only on the Capital Stock of the Company, and shall be binding upon the shareholders and each of them to the extent of their respective shares and interests therein, and not further or otherwise; and that, in contracting debts and liabilities on behalf of the Company, the Directors shall at no time exceed the usual period of credit according to the customs of the several trades or businesses with which the Directors shall from time to time have occasion to deal, contract, or engage.

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58. All Policies of Assurance shall be signed by at least three of the Directors, and sealed with the common seal of the Company; and the Directors shall not issue a Policy until the payment of the first premium duly required to be paid in respect of the Assurances to be effected by such Policy; and every Assurance shall be considered an existing Assurance so soon as the proposal for such Assurance has been accepted by the Directors, and the first premium duly paid either at the office of the Company or to some one of the agents of the Company, and not before.

59. The Directors shall cause the sum payable under every Policy issued by the Company in respect of the Fire Insurance, except in those cases in which they are by these presents authorised to defer the payment thereof, to be paid within three calendar months after such satisfactory proof and information respecting the claim as the Directors may require has been received at the office.

60. It shall be lawful for the Directors to pay any moneys which shall be due and payable in respect of any shares or policies of the Company, upon such evidence of the title of the person or persons claiming to have the same paid to him or them as the Directors shall deem satisfactory.

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61. The sum payable under every Policy, the payment of which is in pursuance of the authority hereinbefore given for that purpose deferred by the Directors, shall bear such interest, not being less than after the rate of £3 for every £100 by the year, as the Directors may think reasonable ; the same to commence from the time when the sum assured by the policy ought regularly to have been paid if the payment had not been deferred ; such interest to be paid out of the fund or funds liable to the payment of the sum assured by the policy to the person entitled to such sum.

81. All directors, trustees, managers, and other officers and servants of the Company shall be indemnified by the Company against all costs, losses, or expenses which they may respectively incur or become liable to by reason of any covenant entered into, or act or deed done by them respectively, in the execution of their respective offices, unless the same shall be occasioned by actual wilful neglect of the party or parties incurring such costs, losses, and expenses ; and the Directors shall give to such party or parties the amount of all costs, charges, losses, damages and expenses incurred by him or them as aforesaid out of any funds of the Company in their hands and under their control, and such costs, charges, losses, damages, and expenses shall, immediately after the same are sustained or incurred, and although the amount thereof be not then ascertained, be a charge upon the funds and property of the Company, and shall as between the parties to these presents have priority over all other claims and demands whatsoever.

The State Fire Company issued policies in several slightly different forms : one form stipulated that "the capital stock and funds of the said Company" should be subject and liable to pay or make good to the insured all damage and loss by fire not exceeding the specified amount, and contained a proviso that the capital stock and funds of

the said Company should alone be answerable for all demands under this and all other policies, and that no director or shareholder should be liable beyond the amount of his shares. In another form the stipulation was, that "the capital stock, or so much thereof as for the time being should have been subscribed, and other the stocks, funds, securities and property of the said Company remaining, at the time of any claim or demand made, unapplied and undisposed of in pursuance of the trusts, powers, and authorities contained in the deed or deeds of settlement," should alone be liable to answer and make good to the assured all claims &c. the proviso being, that the "funds and property of the Company should alone be answerable for the payment of moneys assured by this policy" and limiting the liability of directors and shareholders as before.

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The other policies were all similar to one or the other of these forms, though not in identical terms.

The Company had also guaranteed similar policies issued by another office (*The Times*), whose business it purchased. The policies were in some instances under the common seal, and in others were only executed by directors.

The Company being in course of winding up, assets had been got in (including a call of the full amount of the shares) to the value of about £15,000. The liabilities consisted of about £17,000 of claims proved in respect of losses by fire, besides further claims not yet admitted to proof. There were also debts to a large amount due on bills of exchange, covenants, and simple contracts without any limitation of liability.

Mr. *Rolt*, Q.C. and Mr. *Druce*, for the official manager:—

Argument.

It is now settled, that, although a policy holder under an instrument similar to those issued by the *State Company*

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has a right to a receiver, he has no charge in such a sense as to give him priority. All creditors must be paid *pari passu* out of the funds in hand: *Re English and Irish Society*, No. 2 (a).

Mr. *Bagshawe* for the creditors' representative.

Mr. *Daniel* Q.C., and Mr. *Westlake*, for some of the policy holders whose claims had first accrued, and who claimed to be paid in priority to policy holders whose losses had occurred subsequently, and to all the general creditors. In the case of the *English and Irish Society* the question of marshalling was left open; and there is nothing in the judgment to overrule the earlier decisions that the policy holders have a charge entitling them to priority according to the dates at which their claims arise. In this case the deed and the form of policy expressly recognise this right of the policy holders, for in the 9th clause of the deed the word "claims" is evidently used in a technical sense to signify claims under policies.

[The VICE-CHANCELLOR referred to clause 47, where the word "claims" is used in a more extended sense.]

In *Law v. The Indisputable Company* (b), it was determined that policy holders have a charge; and in *Re Athenæum Society* (c), that they take priority according to the dates at which their claims accrue.

Mr. *Willcock*, Q.C., and Mr. *Roxburgh*, for the other policy holders.

The case is distinguishable from that of the *English and Irish Company*, so far as the mutual rights of the policy holders and general creditors are concerned. Our policies are under seal, and those of my clients are, with one exception, in the form which does not contain any incorporation of the provisions of the deed. The deed of

(a) Ante, p. 85.

(b) 1 K. & J. 223.

(c) Johns. 633.

settlement, moreover, is not in the same terms as that of the *English and Irish Company*, and the case must be governed by the law as settled before the decision in the *English and Irish Company*.

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Mr. Bristowe, for *Times* policy holders, who had taken unconditional guarantees from the *State Company*.—We claim under the guarantee to be general creditors, as to whom the liability of the Company and shareholders is unlimited ; or, if not, then we belong to the class of policy holders who are entitled to priority.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I can see no distinction between this case and that of the *English and Irish Company*. The forms of the policies and the provisions of the deeds are substantially the same. It does not appear to me to make any material difference whether a policy be under the seal of the Company or under the hands of directors, nor whether it does or does not contain a reference in terms to the provisions of the deed of settlement. Whether such a reference is introduced or not, every claimant must be supposed to take payment out of the fund provided for him by the deed, and to be affected with notice of the deed of a Company registered as this is, for every purpose which concerns the liabilities of the shareholders and the respective rights of the policy holders and general creditors. Now, I find that the provisions of the deed in this case, though not identical in terms, are in substance the same as those of the deed of the *English and Irish Company*. There are two funds created, the Shareholders' Fund and the Assurance Fund ; the one derived from the contributions of the shareholders, and the other from the premiums on policies. Then the 8th clause provides for interest on the share

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capital to be paid out of the Shareholders' Fund, or, failing that, out of the accumulations of the Assurance Fund, not required to meet the engagements and liabilities of the Company. The 9th clause directs, that all claims on the Company shall be paid out of the Assurance Fund; or, in case of a temporary deficiency, out of the Shareholders' Fund, which is afterwards to be reimbursed out of the Assurance Fund. Upon this clause, it was suggested that the phrase "claims on the Company," had a technical meaning restricting it to claims in respect of losses under policies; but I think, that, when the two clauses are read together, it is impossible to adopt this construction. The 8th clause speaks of the accumulations of the Assurance Fund which are expected to remain after satisfying the engagements or liabilities of the Company. Then the next clause, evidently referring to the same primary application of the Assurance Fund, uses the phrase "all claims upon the Company," as the equivalent of the "engagements and liabilities" previously referred to. In addition to this, I find that, by the 81st clause, the directors are to be indemnified out of any funds in their hands or under their control. Then the 47th clause empowers the directors to accept bills for discharging existing claims and liabilities to take effect against the capital stock of the Company, as distinguished from the personal liability of the shareholders; the force of the words 'capital stock' being simply to exclude the liability of shareholders beyond the amount of their shares, the general object being to provide for all claims and liabilities of every kind out of the assets of the Company, without affecting the shareholders personally.

I have now to consider the question which was raised before me in *Law v. The Indisputable Company*, and in the *Athenæum case*, at a time when the subject had not been so fully discussed as it has been since those decisions. I am inclined to think that some of the expressions I used in the

latter case went too far, but I adhere to the decision which I pronounced in *Law v. The Indisputable Company*, and followed in the *Athenæum* case. In all these cases, where a Company gives notice to the persons with whom it contracts, that there is to be no personal or direct liability, but that, on a policy coming due, a claim shall arise to the extent of all the assets of the Company; there, I apprehend, the claimant has a right to come to a Court of Equity for a receiver, in order to secure the due application of the assets, which are admitted to be provided for payment of his claim. In that particular sense, therefore, the policy holder has what may be termed a charge. But in carrying that doctrine (as I appear to have done in some of the dicta which fell from me in the *Athenæum* case) to the extent of saying, that, because the claims were charges, they ought to be marshalled in order of time, I am of opinion that I went beyond what is now settled by the case of *Evans v. Coventry* to be the true construction of this class of instruments. That case appears to me to determine the whole question. Unfortunately, there is no report of the reasons of the learned judges who heard the case on appeal; but the terms of the decree are given in the *Law Journal Report* (a).

The case was one of a very complicated character, involving not only claims under policies which had become payable, but also in respect of policies which were still subsisting when the Company became insolvent, and on which premiums had been paid. The decree declares, that the funds and property of the Company ought to be applied in payment of the claims of the Plaintiffs and all other persons, and directs an account to be taken of all the debts and liabilities of the Company when it closed business, and at the date of the decree. Then it directs inquiries as to a particular loss incurred by the default of one of the

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(a) 26 L. J., Ch., 400.

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Defendants ; and then follows an inquiry,—what shares the Defendants held, and what was due upon them ; what insurances were in existence when the Company closed business, whether for life or during sickness ; and what annuities were then subsisting, and what was the value of such insurances, and what sums were due for loans or deposits, so that everyone seems to be let in *pari passu*, the construction apparently put upon the deed and the policies being that all persons having matured claims at the time of the administration were entitled to participate in the fund. I am not now called upon to decide the other point, which arose in *Evans v. Coventry*, as to the right mode of dealing with claims which had not matured ; but so far as the assets have not already been appropriated by decree or judgment, or by attachment on the part of a creditor, I take it, that, on the principle of *Evans v. Coventry*, all claimants upon the fund at the time of distribution must come in *pari passu*.

The question argued before me to-day is, in fact, the converse of that which was discussed in the case of the *English and Irish Company*. There it was contended, that the general creditors took priority over the policy holders. Here the claimants under policies insist on a priority over the general creditors. The conclusion at which I have arrived is the same as in the former case, that the policy claimants and the general creditors must come in *pari passu* as against the assets in hand for distribution. The only substantial distinction (apart from the remedy of the general creditor against individual shareholders) between the two classes of claims is, that the policy holder having an express stipulation, that a particular fund is to be appropriated to the satisfaction of his demand, has a right to come into equity for a receiver. This Court will not allow persons who have contracted to hold a fund upon trust for payment of certain debts, as to which they have stipulated for absolute personal immunity, to waste the funds committed to their charge, but will take care that they are duly applied.

At the same time, I see nothing in this case to distinguish it from *Evans v. Coventry*, and to entitle any of the policy holders to such a charge as would give priority, either as between themselves or as against the general creditors. I repeat what I said in the former case, that I cannot refuse to a creditor his immediate right to participate in the distribution of the assets in hand, merely on the ground that he has a personal remedy of doubtful value against the shareholders of the Company.

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With respect to the *Times* policy holders, I do not think that any appearance was necessary on their behalf, as they must fall within one or other of the classes otherwise represented; and the only question peculiar to them, namely, whether they belong to one or another class, is not raised at all on the present occasion. I cannot, therefore, allow their costs. The costs of all other parties will be allowed.

DECLARE, that the Official Manager ought to distribute the assets of the Company in his hands rateably among all the creditors of the Company, including policy-holders, without prejudice to any question as to marshalling.

Minutes.

Costs of all parties except the *Times* policy-holders to be paid out of the assets of the Company.

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June 20th, 25th. **PETO v. BRIGHTON, UCKFIELD, & TUNBRIDGE
WELLS RAILWAY COMPANY.**

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formance—
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Contract.*

This Court has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of the Plaintiff is the execution of certain works which the Court is unable to superintend.

Therefore, where the Bill stated an agreement to employ the Plaintiffs as contractors for making a railway, and to pay for the works in debentures and shares of the Company, a motion for an injunction to restrain the Company from dealing with the debentures, and transferring the shares in question to others, in derogation of the Plaintiff's rights, was refused.

THIS was a motion for an injunction (a).

By the *Brighton, Uckfield & Tunbridge Wells Railway Act, 1861*; the *Brighton, Uckfield & Tunbridge Wells Railway Company* (hereinafter called the *Uckfield Company*) was incorporated and authorised to make a certain line of railway.

Early in December, 1862, the directors of the Company employed Mr. *George Hinton Bovill* to make an arrangement for the construction of their line, and they authorised him to treat with the Plaintiffs, Messrs. *Peto & Betts* (the well-known railway contractors) for the purpose.

On the 2nd of February, 1863, the Defendants, *Cary*, *Fox*, and *Jameson* (the then directors of the Company) wrote and sent to *Bovill* the following letter:—

“41 *Parliament Street*, 2nd Feb., 1863.

“*Brighton, Uckfield & Tunbridge Wells Railway.*

“Dear Sir,—We hereby authorise you to agree with Messrs. *Peto & Betts* on our behalf to execute the works of our railway in accordance with the several plans and sections supplied to them by you for the sum of £215,000, payable by £65,000 in debentures bearing £5 per cent. interest, and the balance in shares of the Company taken at par, the payments to be made in the usual way as the works progress.—Yours faithfully,

“JOSEPH CARY, Chairman.

“HY. HAWES FOX.

“ROBERT O'B. JAMESON.

“To *George Bovill*, Esquire.”

(a) This motion was not in fact made till after the motions in *Filder v. The Brighton Railway Company*, and *Barchard v. The*

Uckfield Railway Company (post, p. 489), but for convenience-sake it is reported before them.

Immediately after this letter had been given to *Bovill*, *Mr. Carnsew*, the solicitor of the Company, had an interview with him on the subject ; but there was conflicting evidence as to what passed thereat and consequent thereon. According to *Carnsew's* account, a draft of this letter was shown to him for the first time on the 2nd of February (after the original had been given to *Bovill*) and his affidavit proceeded in the following words :—

“ As soon as I had read the same, I was satisfied that no contract on the basis of the said letter could be sanctioned by my said Company ; and I arrived at that conclusion by reason of the fact that the balance of unexpended capital and of the money raiseable under the borrowing powers of my said Company was totally inadequate to provide for the purchase of land and payment of the debts and liabilities of the Company, over and above the £215,000 provided by the said letter to be paid to the Plaintiffs ; and I say that, having explained to the directors the position in which they would be placed if the terms of the said letter were carried out, they at once informed me that the said letter was not to be considered as binding the Company, but was merely written as an authority to the said *Mr. Bovill* to negotiate with the Plaintiffs on their behalf. I felt, however, the importance of at once seeing *Mr. Bovill*, and informing him of my objections to the contents of the said letter, and accordingly, with the express sanction of the directors, went at once, accompanied by the Defendants *Joseph Cary* and *Robert O'Brien Jameson*, to the offices of the Plaintiffs in *Great George Street, Westminster*, where I thought it probable I should find the said *Mr. Bovill*. The said Defendants left me at the entrance to the Plaintiffs' said offices, and I went into the waiting room, where I found the said *Mr. Bovill* alone. He said, that he was waiting to see the first-named Plaintiff, and I at once complained of his having allowed my said directors to sign the said letter. He asked me why I was dissatisfied, as the terms were the

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same as had been previously discussed. I said to him: "Take some paper, and I'll soon show you why," or words to that effect; whereupon the said Mr. *Bovill* took down on paper, from my dictation, the particulars of the capital and borrowing powers of the Company; and I explained to his entire satisfaction, as admitted by him at the time, that the terms of the said letter could not be acted on, and that the said Company had not in fact the means at their command of entering into any contract for the construction of their railway upon the basis of the said letter. The said Mr. *Bovill* then said, that the first-named Plaintiff was on the point of leaving for *Vienna*, and that to discuss the subject with him, as I had then explained it, might lead to the Plaintiffs' withdrawal from all further negotiation; and that it had better be left as a matter of detail to *Newman*, meaning thereby Mr. *Newman*, of the firm of *Freshfields & Newman*, the Plaintiffs' solicitors. I thereupon immediately stated, that whatever course he might choose to pursue in his approaching interview with Sir *Morton* (meaning thereby the first-named Plaintiff), he must distinctly understand from me that I would not advise my board to enter into an agreement upon the terms contained in the said letter which was lying on the table, and that I was satisfied my directors would not sanction it, as I had explained the difficulties to them, and they had quite concurred in my views. I say that in the course of a day or two after the said interview, the said Mr. *Bovill* called at my office in *Parliament Street* aforesaid, and informed me that he had seen the first-named Plaintiff since our interview on the 2nd inst., but that he had not communicated to him the particulars of our then conversation; and he stated that the said Plaintiff had referred the matter to the said Mr. *Newman* to settle the details. I then, understanding that the said Mr. *Bovill* had not yet seen Mr. *Newman* on the subject, impressed on him the absolute necessity of his at once informing the said Mr.

Newman of what took place at our interview on the 2nd ; and although the said *Mr. Bovill* appeared at first disinclined, he ultimately agreed and promised to do so."

Mr. Bovill, on the contrary, asserted that the terms mentioned in the letter in question had been arranged between himself and *Cary*, with *Carnsew's* concurrence, so long previously as the 16th January, and that on the 2nd February *Carnsew* had come into the Board-room of the *Uckfield* Company before he (*Bovill*) had left it ; and that *Cary* had handed a copy of the letter to *Carnsew*, with the remark, "That's all right: it's the same as we settled the other day;" and that *Carnsew* had read it without making any remark : and he denied that *Carnsew* had ever said to him that the Company had not the means of carrying out the contract, and that *Mr. Newman's* name had ever been mentioned ; and he said that the only conversation which took place on the occasion in question had been that *Carnsew* had said that the estimate had been arrived at on the basis of taking the shares of the Company at par to meet all the estimated payments, and that *Cary* considered that the Plaintiffs ought to contribute to any deficiency that might arise if the shares should fall below par ; and that he (*Bovill*) had pointed out that a large part of the expenses were to be paid for in shares, and that if the Plaintiffs undertook the contract, the shares would be marketable at par, to which *Carnsew* had replied, 'that is all right.' He then said that *Carnsew* had pressed him to get *Sir Morton Peto* to sign a letter to the directors of the *Uckfield* Company accepting the contract on these terms, and he produced a draft letter (which was, as he swore, in *Carnsew's* handwriting) in the following terms :—

Brighton, Uckfeld, & Tunbridge Wells Railway.

"Gentlemen,—Having examined the plans and estimates of this Railway, we hereby undertake to accept the proposals

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contained in your letter of this date and to execute a contract on the terms thereof, to be settled in case of dispute by *J. H. Lloyd, Esq., of King's Bench Walk.*"

Carnsew was afterwards cross-examined before a special examiner, when he admitted that this draft letter had been written in his office on the 2nd of February after he had heard of the letter of authority, and had been given by him to *Bovill*, and that he had asked *Bovill* to get that letter signed by *Sir Morton Peto*; and he said in explanation of his having done so,—“When I was shown the letter of authority I did not believe that *Mr. Bovill* was in communication with *Sir Morton Peto* at all, as it is too much a custom to hawk the contracts about in this way; and after receiving the authority of the directors mentioned in my affidavit, I roughly sketched out the letter, to see whether *Sir Morton* really knew anything about the transaction; and with that view, as a thing to test him, I asked him to get *Sir Morton Peto* to sign it. He said, ‘he won’t do that,’ or words to that effect. On his objecting, I did not press or urge him, but asked him to get a letter from *Sir Morton* to the directors, saying that he was ready to treat.

Both the directors and *Carnsew* said that *Bovill* was upon this occasion, or at any rate before the 2nd of February, informed that the authority in question was revoked “and the said letter was to be treated as withdrawn;” but this was distinctly denied by *Bovill*, and it was admitted that the letter had been left in his possession.

On the 23rd of February, 1863, the following memorandum of agreement was signed:—

“London, 23rd February, 1863.

“AGREED with Messrs. *Peto & Betts*, that they shall make the *Tunbridge Wells & Uckfield Railway Works* in accordance with the plans and sections supplied to them, for the

sum of £215,000, terms of payment and all other conditions as stipulated in the directors' letter of authority.

"For the *Brighton, Uckfield & Tunbridge Wells Railway Co.*

GEORGE H. BOVILL

"For *S. M. Peto & Self,*

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On the same day *Bovill* wrote to the directors of the *Uckfield Company*, and personally delivered to them, the following letter:—

"41, *Parliament Street, Westminster, S.W.*
23rd February, 1863.

"To the *Chairman and Directors of The Brighton, Uckfield, & Tunbridge Wells Railway Co.*

"Gentlemen,—I beg to inform you, that in accordance with your instructions and letter of authority I have this day concluded with Messrs. *Peto & Betts* the contract for making your Railway, for the sum of £215,000, the payment and other conditions upon the terms stipulated in your said letter of authority to me.

"I am, Gentlemen, your obedient Servant,

"GEORGE H. BOVILL."

There was considerable conflict of evidence as to what took place at the interview which *Bovill* then had with the directors, but the Court treated the point as immaterial.

During this time, the directors of the *Uckfield Company* were also in treaty with the *London, Brighton, and South Coast Railway Company* (hereinafter called the *Brighton Company*), with a view of disposing of the line to them; and it appeared that a principal object with them was to get into their hands the *Midhurst and Bognor Railway Company*, which they could only do by means of the *Brighton Company*. On the same 23rd of February the *Uckfield Board* received a letter from Mr. *Schuster*, the Chairman of the *Brighton Company*, dated the 24th of February, which contained an offer on the part of that

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Company to construct the line on certain terms, afterwards embodied in a formal contract.

It appeared from the rough minute book of the *Uckfield* Company, that *Bovill's* letter had been read at the Board prior to the letter from the *Brighton* Company; but the latter letter was entered in the fair minute book above the former. In explanation of this, Mr. *Stahlschmidt*, the Secretary of the Company, swore that *Bovill's* letter had in fact been read at the Board about half an hour before the letter from the *Brighton* Company, but that *Cary* had directed him to enter this letter in the fair minutes before *Bovill's*. He also said that *Carnsew* had afterwards directed him to destroy the rough minute book.

Immediately after this Board-meeting another interview took place between *Carnsew* and *Bovill*, the effect of which was differently deposed to by them. *Carnsew's* account of this matter was as follows:—

“After the said Mr. *Bovill* had left the room, the Defendant *Joseph Cary* placed the letter set forth in the 8th paragraph of the Bill” (being *Bovill's* letter (a) of that date) “upon the table. I was much surprised in reading the said letter; and very shortly afterwards (within half-an-hour) I met the said Mr. *Bovill*, and thereupon a discussion took place between us relative to the last-mentioned letter; and I then found that he insisted on treating the said two letters of the 2nd and 23rd of February as constituting a binding agreement between the Plaintiffs and my said Company. I was much startled at the view taken by the said Mr. *Bovill*, and told him I should immediately communicate with the directors on the subject; and I did so.”

Bovill, on the contrary, gave the following version of this meeting:—

(a) *Supra*, p. 473.

"After the Board-meeting of the *Uckfield* directors on the 23rd of February, I went into *Lucas's* restaurant, in *Parliament Street*, and there I met the said *Henry Carnsew*. He came up to me and said, 'I am very glad I have seen you, for *Cary* is under some misapprehension as to our understanding, for he considers that the arrangement made with *Peto & Betts* does not preclude him from still making an arrangement with *Schuster*;' and he added, 'I told him he was wrong, and that, after the letter concluding the contract, he could not do so. He wanted me to go to *Schuster*, but I refused;' and he (*Carnsew*) said that *Cary* had replied to him, 'then I will;' or words to that effect. The said Mr. *Carnsew* then requested me to return to his office and write to the said *Joseph Cary*, which I consented to do, and did; but owing to the hurry in which the letter was written, and the desire of *Carnsew* to send the same off to *Cary*, to stop him, as he said, from going to *Schuster*, I did not keep any copy of the said letter. *Carnsew* also wrote to *Cary* a letter to accompany my letter, which letter he (*Carnsew*) read over to me." *Bovill* further stated that he had applied to *Cary* for copies of these letters, but had been unable to obtain them.

Copies of these letters were however afterwards procured through the instrumentality of Mr. *Stahlschmidt*.

Bovill's letter was as follows :—

"41, *Parliament Street*, *Westminster*, *S.W.*

"23rd February, 1863.

"Dear *Cary*.—Mr. *Carnsew* tells me that you are under the impression that I told you that under the arrangement I made with *Peto & Betts* there was no objection to your still treating with Mr. *Schuster*. You must have quite misunderstood me, for such a proceeding would be quite opposite to our policy. You will remember that I told you that *Peto & Betts* would have no objection to take over

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the whole concern, instead of simply the contract which I have concluded with them, and retain the other directors to carry it out. Any communication to Mr. *Schuster*, under the circumstances, I'd consider would be a breach of faith with *Peto*.—Your's faithfully,

" *Joseph Cary, Esquire.*

" GEORGE BOVILL."

Cary's letter (about the production of which some difficulty was made, but which was ultimately produced,) was in the following terms :—

" 41, *Parliament Street, S.W.*

" 23rd February, 1863.

" My dear *Joe*,—The enclosed from *Bovill*, whom I accidentally met at the luncheon bar, shows how wrong it is to trust to verbal communications in the face of written instructions.

" The only thing to be done is to avoid seeing *Schuster* until we have settled with these people, and say we could not agree with him on account of his proposed deviations.

" Farewell *Bognor, Midhurst &c.*

" Ever yours,

" H. C."

On the 25th of February the directors of the *Uckfield* Company caused the following letter to be written and sent to *Bovill* :—

" *Brighton, Uckfield and Tunbridge Wells Railway,*

" 41, *Parliament Street, S.W.*

" 25th February, 1863.

" Dear Sir,—I am desired to inform you that this Board cannot recognise the arrangement referred to in your letter of the 23rd instant. I am further directed to express the surprise of the directors that you should have acted upon it when you were informed by the solicitor of the

Company (before submitting it to your principals) that it did not embrace the terms upon which an arrangement could be carried out.

" I am, dear Sir,

" Yours faithfully.

" H. STAHLSCHEMIDT, Sec."

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To this letter *Bovill* returned the following reply :—

" *Durnsford Lodge, Wandsworth, S. W.*

" 26th February, 1863.

" *To the Chairman and Directors of the Brighton, Uckfield, and Tunbridge Wells Railway Company.*

" Gentlemen,—I have to acknowledge receipt of your Secretary's letter of yesterday's date, informing me that 'your Board cannot recognise the arrangement referred to in my letter of the 23rd instant;' and also stating, 'I am further directed to express the surprise of the directors that you should have acted upon it when you were informed by the solicitors of the Company (before submitting it to your principals) that it did not embrace the terms upon which an arrangement could be carried out: I beg to state in reply that you are my principals, that I was applied to by your chairman to assist your Company out of the difficulties it was in at that time (14th December last). After several conferences with you all, you employed me professionally to negotiate with Messrs. *Peto & Betts* for the making of the works of the railway, or for purchasing the Company out and out. Subsequently, on the 2nd February, I had carried forward the negotiations with Messrs. *Peto & Betts* to the point that they were willing to take the contract for making the line for payment in shares or debentures, as proposed by you, provided, on taking out the quantities and going over the country through which the railway was to be made, they found the prices I had offered them on your behalf were sufficient. A letter was then written (2nd February), signed by all the directors, au-

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thorising me to agree with Messrs. *Peto & Betts* on the terms and conditions therein set out for making the railway. I have acted upon my written instructions, and from time to time have reported to you the progress of the investigations of the plans and estimates by Messrs. *P. & B.* Moreover, your own agent, Mr. *Fernandez*, has from time to time assisted Messrs. *Peto & Betts's* agents in checking the estimates and quantities, and subsequently went over the ground with them. I am at a loss therefore to understand the meaning of the last paragraph of your secretary's letter; indeed, so far from your solicitor informing me that it did not embrace the terms upon which an arrangement could be carried out, I must remind you that almost day by day down to the very hour of my closing the contract, you have been urging me to get the arrangements concluded with Messrs. *Peto & Betts*; and your solicitor has generally been present at our meetings. I have referred to my minute book of the frequent meetings, and I now state most distinctly that the only definite instructions I have received are those contained in the letter of the 2nd February, and I have acted as your agent strictly in accordance therewith. With reference to the suggestion that Messrs. *Peto & Betts* are my principals, I beg to say, that in order to assist in carrying out the agreement for a contract for your line, I, at their request, agreed to negotiate, with the assistance of yourselves, for the *East Grinstead & Groombridge* and *Hartfield & Uckfield Railways*, so as to get possession of the district, and thereby greatly improve the value of your line. On the 4th February I saw Mr. *Carnsew*, your solicitor, thereon; I explained to him, and subsequently to yourselves, in the fullest confidence, the policy and importance of such an arrangement, and in which you were principally interested. Mr. *Carnsew* and yourselves quite appreciated the importance of acquiring these lines, so as to have them as part of a whole system with yours, instead of being opposition lines, and Mr. *Carnsew* entered into negotiations

with Mr. *Roy* to obtain an offer nominally to your Company, but really for *Peto & Betts*, of these said railways.

* * * *

"I have taken the trouble to write at this length, for I am determined not to be misrepresented; moreover I cannot help saying, that if the last paragraph of your Secretary's letter was really written by your direction it was most unwarrantable. From the conversation that occurred on Tuesday, between Mr. *Cary*, Mr. *Carnsew*, and myself, it seems pretty clear to my mind, that the real cause of your desire to repudiate the contract I have concluded on your behalf with *Peto & Betts*, may be traced to your having sold yourselves (the Company) to the *Brighton* Company. It would certainly have been more straightforward if you had so stated (for the facts must come out), instead of attempting to support your acts, by imputing improper conduct to me; I will venture to say that neither of the gentlemen I have the honour to address would in his individual capacity have so acted. I will, of course, hand a copy of your Secretary's letter to Messrs. *Peto & Betts*, and it will be for them to act in the matter as they may think proper.

"I am, Gentlemen,

"Your obedient Servant,

"G. H. BOVILL."

On the 16th of March, 1863, the Plaintiffs filed their Bill for specific performance of the contract, and other relief ancillary thereto; and they submitted specifically to perform the same on their part.

On the same 16th of March, the *Uckfield* and *Brighton* Companies finally concluded a definite agreement with one another, whereby (amongst other things) the *Brighton* Company undertook to find solvent persons to take up all the unpaid capital of the *Uckfield* Company, and to apply for proper parliamentary powers for the purchase of the

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said Company, who were in the mean time to complete the construction of their line with all convenient speed.

The Plaintiffs now moved for an injunction in the terms of the prayer of the Bill.

Mr. Giffard, Q.C., and Mr. Druce, for the motion :—

A contract in respect of certain specific chattels is as much within the jurisdiction of this Court as a contract respecting real estate: *Cory v. Thames Ship Building Company (a)*.

We have clearly proved *Bovill's* authority to act for the Company; and the fact that he entered into the contract with the Plaintiffs. The Defendants say the authority had been revoked; but that revocation had not been disclosed to *Bovill*: *Neeld v. Duke of Beaufort (b)*. The contract is for shares; therefore this is not a mere money demand, cognisable at law: *Duncroft v. Allbrecht (c)*. It is no objection that the Court cannot see to the performance of their part by the Plaintiffs; we must perform it at our peril; if we fail, the Defendants can come at once and dissolve the injunction: *De Mattos v. Gibson (d)*.

Want of mutuality in the remedy is no bar to the suit: *Lumley v. Wagner (e)*. This is as if the Defendants had said, "provided you do this work you shall have such and such an estate," and had then contracted to sell that estate to a third party.

Sir Hugh Cairns, Q.C., and Mr. Speed, for the *Uckfield Company* :—

The directors had no power to authorise *Bovill* to contract (*f*), and all they ever professed to give him was a mere authority to negotiate and agree: *Kirk v. Bromley Union (g)*.

(a) 11 W. R. 589.

(b) 5 Jur. 1123.

(c) 12 Sim. 189.

(d) 4 De G. & J. 276.

(e) 1 D. M. G. 604.

(f) Companies Clauses Act, ss 95, 96.

(g) 2 Ph. 640.

The contract is purely executory, and is a simple agreement to make a railway for money's worth. That is not a case for the interference of this Court: *Shrewsbury and Birmingham Railway Company v. London and North Western Railway Company* (a).

The contract is too vague to be specifically performed: the payments are to be made "in the usual way:" *Ogden v. Fossick* (b).

This case is like that of a Bill for an assignment of a patent, which this Court has refused to entertain for want of power to compel the Plaintiffs to work the patent: *Stocker v. Wedderburn* (c).

There is no mutuality. The contractors may die, and then the shares and debentures would be thrown on the hands of the Company: *South Wales Railway Company v. Wythes* (d).

[They also referred to *Johnson v. Shrewsbury and Birmingham Railway Company* (e), *Heathcote v. North Staffordshire Railway Company* (f), *Pickering v. Bishop of Ely* (g), *Dietrehsen v. Cabburn* (h), *Jackson v. North Wales Railway Company* (i).]

Mr. Waller for the directors of the *Uckfield* Company:—

Bovill knew that the authority had been revoked. He had been expressly told that the agreement could not be carried out. Every one who deals with an agent does so at peril of finding that the authority has been revoked. *Neeld v. Duke of Beaufort* (k).

Mr. Rolt, Q.C., and Mr. J. H. Taylor, for the *Brighton* Company:—

(a) 6 H. L. Cas. 113.

(b) 11 W. R. 128.

(c) 3 K. & J. 393.

(d) 1 Id. 186; s. c. 5 D. M. G. 880.

(e) 3 D. M. G. 914.

(f) 2 M. & Gor. 100.

(g) 2 Y. & C., C. C. 249.

(h) 2 Ph. 52.

(i) 6 Railw. Cas. 112.

(k) *Ubi sup.*

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We have no power over these shares. In performance of our agreement, we have found persons to accept them, and those persons are not parties to the suit.

The VICE-CHANCELLOR.—Mr. *Giffard*, I have no doubt that this has been a gross breach of faith. You may confine your reply to the question of jurisdiction. I do not see how I am to compel the Plaintiff to perform the contract on his side.

Mr. *Giffard*, in reply :—

The authorities are all distinct from this.

In *Ogden v. Fossick*, the two agreements were not separable ; and what the Plaintiff wanted was not an injunction, but complete specific performance, which the Court had no power to effect.

South Wales Company v. Wythes was, in effect, a Bill to enforce a reference to arbitration.

Pickering v. Bishop of Ely was a mere case of master and servant. You cannot, as Lord Justice *Knight Bruce* observed, have a Bill to compel a man to take you as his butler.

The case is completely governed by *Lumley v. Wagner*, where the Court said to the Defendant : "True it is we cannot make *Lumley* give you proper advantages, but we can hold you to your agreement till you show breach of duty on his part."

De Mattos v. Gibson shows that an express negative contract is not necessary.

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

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This case turns upon the question, how far this Court

can interfere where a contract provides that the Plaintiffs, in consideration of certain shares and other advantages which the Company engaged to give them, were to complete the construction of some ten or eleven miles of railway, a contract, which I shall assume, for the present purpose, to require the works to be executed on the terms which are ordinarily inserted in agreements of this nature. This being the nature of the contract, the Bill asks, "that it may be declared to be valid and binding on the *Uckfield* Company, and that it may be specifically performed, the Plaintiffs being willing to perform the same on their part; and that the *Uckfield* Company and the directors thereof may be restrained by injunction from permitting the *Brighton* Company or any other person, except the Plaintiffs, to make the railway and works in question, and from disposing of and dealing with the £215,000 shares and debentures agreed to be applied in payment for the construction thereof, and from entering into any agreement or doing anything whereby the said line of railway and works may be constructed otherwise than in accordance with the Act of 1861, or whereby the Plaintiffs may be prevented from performing and having the full benefit of the contract."

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Now, on this the difficulty at once arises, that if I restrain the transfer of these shares I can only do so on an undertaking on the part of the Plaintiffs that they will perform their part of the agreement; a submission to do so is a necessary ingredient in the Bill, and it is essential that that offer should be one over which this Court should have complete control; if that were not so, the result would be to restrain the Company from dealing with these shares without securing to them the benefit of the Plaintiffs' undertaking. At the same time, the case strikes me as one exceeding an ordinary case of breach of faith, and I was very unwilling to part with it without giving the Defendants an opportunity of explaining their conduct. Their

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conduct seems to me to have assumed this character: they deliberately entered into a contract which they thought would be beneficial to them, and they determined upon an equally deliberate breach of that contract so soon as they found, or thought, it to be to their interest so to do.

Let us see how the matter stands: *Bovill* was appointed their agent to carry out the negotiation with the Plaintiffs:—I should not, on an interlocutory application, have entered into the question whether such an appointment was or not within the powers of the directors: I should have left that question to be determined at the Hearing, and have restrained the Defendants in the meantime:—Then they say that his authority had been revoked before any contract was concluded: true, that authority was given in writing and they left him in possession of the written document; but they say, that he had had verbal notice two or three days before the agreement was concluded, that his authority had been revoked, and that the agreement would not be confirmed. I must say I never knew a more extraordinary case than that put forward on the part of the Defendants. I merely mention *Mr. Carnsew's* evidence on this point, and leave it to speak for itself, without adding a single word by way of comment upon it. [His Honour read the affidavit and deposition on cross-examination, *supra*, pp. 469, 470, 472.]

Therefore, in effect he says, "I saw that the agreement could not be carried out: I told the Board so as soon as I heard of it, and I expressly said so to *Bovill*." But then at the very time when he was telling *Bovill* that the agreement could not be carried into effect, he produced to him this paper, and proposed that he should sign it. [His Honour read the draft letter to Sir *Morton Peto*, set out above, p. 471.]

The terms of this letter were, as he says, impossible terms; and yet he wishes *Bovill* to get Sir *Morton Peto* to sign a contract by which he is to be bound, but which, on this view

of the case, was incapable of execution. Then how does he try to explain this conduct? He says "I thought *Bovill* was a speculator, who was hawking about the Company;" (such persons do, I believe, exist) "and I wanted to test him." That may or may not be so, but this fact remains, on which I do not think it necessary to comment, that *Carnsew* having made up his mind that this was an improper contract, not only left in *Bovill's* hands that contract and the written authority upon which it was founded, but also tried to induce him to act towards the Plaintiffs in a manner calculated to bind them to its performance.

Then it is said—"At the last of the conferences on the subject *Bovill* was told of the treaty with the *Brighton* Company, and he must have known that both contracts could not be concluded."

I do not think that this argument at all improves their case, it merely proves, at most, that they then informed *Bovill* of their determination to throw over that which he had done with their authority.

I do not pause here to consider the dealings with the rough minute book, further than to remark that what there appears confirms the view I have taken of this matter.

Now when we come to *Bovill's* evidence the matter is put beyond question. *Bovill* says "I met *Carnsew* at the coffee house, and he told me that *Cary* thought they might still go on with the *Brighton* Treaty; and, when I said that that could not be, he proposed that I should write a letter to that effect, which he could send to *Cary*; and I accordingly did so." Then *Carnsew's* first affidavit denies that what *Bovill* has deposed to in fact took place; but the letter is produced, which shews that *Bovill's* statement is true in every respect, and we have the effect of this interview on *Carnsew's* mind shewn by the very remarkable letter from him to *Cary* which accompanied *Bovill's* letter.

[His Honour read this letter: see ante, p. 476].

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"Farewell *Midhurst, Bognor, &c.*" what does that mean? What but that he found, or thought he had found, that it was impossible to get off the contract with the Plaintiffs, and therefore supposed that all chance of connection with the *Brighton* line, which carried with it the *Midhurst, &c.*, had to be relinquished.

Mr. *Speed* asks me to disbelieve *Bovill*; the evidence leads me to do just the contrary. I say nothing more on this point, but I cannot leave the evidence without making some remark upon the subsequent treatment of *Bovill* by the directors. [His Honour read the letter of February 25th, ante, p. 476]. I never read a more discreditable letter. The man is their agent, acting under their written authority, and yet they attempt to turn round on him and tell him that he had been informed he was not to act, which is entirely untrue. The best comment on this is *Bovill's* reply, with every word of which I agree. [His Honour read *Bovill's* letter of February 26th, ante, p. 477].

I have every possible inducement to afford the Plaintiffs as large a measure of relief as I can give them consistently with the established principles of this Court, but I feel the difficulties to be quite insuperable.

If there were a distinct negative contract in this agreement, such as the contract which has now become usual in ordinary agricultural leases, that the lessee will not farm otherwise than according to the custom of the country, the Court might fasten upon that, and separating that from the rest of the agreement might enforce specific performance of that contract: but when a Plaintiff comes into this Court upon an agreement which does not contain any such direct negative clause, and where you must infer the negative from the necessity of the case, the instances in which the Court has found it possible to act are very few and special. In *De Mattos v. Gibson*, where the Plaintiff had nothing on his part to perform, the

Lords Justices said, "We will not permit the Defendant to do that which would render it utterly impossible for him to perform his contract." So, in a case which came before me some time ago, where an actor had agreed to perform at a particular place on certain days, I thought myself justified in restraining him from acting elsewhere upon those days during the ordinary hours of theatrical performance.

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But I cannot bring this case within the principle involved in *De Mattos v. Gibson*, because here the Plaintiffs have to perform their part of this agreement by constructing the railway, whereas no difficulty existed, in as much as, in doing complete justice, the Plaintiff had nothing to do but to pay the sum agreed upon by the charter-party, a condition which it was within the power of the Court to enforce.

Then it is said, that in *Lumley v. Wagner* the same difficulty occurred; but the difficulties there were small in comparison with those which I have to meet. No doubt it might be very important to Madlle. *Wagner* not to be compelled to sing, unless she had every arrangement of the best kind to enable her to make as great an impression as possible; but then it was clearly *Lumley's* interest to afford her every facility in his power; and if he did not do so, she would have obtained all she wanted by being released from her agreement. But here I perfectly agree with the observation of Sir *Hugh Cairns*, that these shares are of such a character, that it is no consolation to the Defendants to be told, that if the Plaintiffs should fail to perform their part of this agreement, the injunction will go, and the shares thereby be let loose; they might be depreciated by the very fact of such failure. I do not lay any stress upon the fact that I should lock up the land of this Company for an indefinite time. In *De Mattos v. Gibson* the Lords Justices thought that the principle of *Lumley v. Wagner* made it right that the ship in question

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in that case should remain utterly useless performance of the contract ; and I should on the same principle here.

Perhaps the case which bears the closest present one is *Ogden v. Fossick*. That turned on the consideration that the Court could not compel the Plaintiff to employ the Defendant according to the agreement. I thought that I could separate the terms of the agreement, and decree specific performance to give a lease, leaving the Defendants to apply to the other clauses : the Lords Justices, however, thought that could not be done ; but they seem to have supposed that the desired end might be reached by a proviso for re-entry if the Plaintiff did not perform his contract, and they remitted the case to me with a view to the expression of that opinion. I endeavoured so to state the case as to meet their Lordships' view ; but when I came again before them, they, without expressing any opinion upon the form of the lease, simply dismissed the bill apparently on the ground that they could not do that way, do complete justice. Lord Justice giving judgment in that case, observed, " It is impossible to require performance of the agreement might be affected by the covenants in the lease for the employment of Mr. Fossick to be enforced by a general condition of re-entry ; at the effect of the agreement, I do not think it possible. I cannot doubt that the purpose of the agreement of *Samuel Fossick* was, that he might carry on his connection with the business without its being affected by other channels. In this respect, the above mode of giving effect to the agreement would not avail *Samuel Fossick*. He would be driven to his remedy at law, and in the meantime his business would be broken up."

Similarly here, if these gentlemen, being under an undertaking, express or implied, to perform this agreement,

should fail in doing so, I could not place the parties in the position in which both sides intended that they should be; and I should be driven to leave the Defendants, when they came here to complain of such failure, to their remedy at law.

Seeing, therefore, that no arrangement could so deal with the case as to do complete justice to both sides, I think the only proper course for this Court to take, is to leave both parties to their remedies at law.

I must, therefore, refuse this motion. As against the *London Brighton and South Coast Railway Company*, the costs will be costs in the cause, but as against the *Uckfield Company* and their directors, I refuse the motion without costs.

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THE facts of these cases are the same as those of *Peto v. The Brighton, Uckfield, and Tunbridge Wells Railway Company* (ante, p. 468).

These Bills were filed for the purpose of preventing the agreement come to between the Companies (*See* p. 479) from being carried into effect. The Plaintiff *Filder* was the owner of four shares and £50 stock in the *London and Brighton Company*, and the Plaintiff *Barchard* was the owner of twenty-five shares in the *Brighton and Uckfield Company*; and each Plaintiff filed his Bill on behalf of himself and all other shareholders in his own Company except the Defendants, against both the Companies and

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Railway—Ultra Vires—Right of Shareholders.

Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers; still, where it appears that the Plaintiff is merely a puppet in the hands of others, not shareholders in the Company, who indemnify him against the costs of the suit, the Court will not interfere by interlocutory injunction.

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their respective Boards of Directors, complaining of the agreement in question as ultra vires and unauthorised, and likely to be prejudicial to the Companies respectively, and praying for injunctions to restrain the Companies respectively and their respective directors from carrying such agreement into effect. The Plaintiff *Barchard* further alleged that it was material for the interests of the *Brighton* and *Uckfield Company* that the agreement which they had entered into with Messrs. *Peto & Betts* (see ante, p. 472) should be carried into effect, and he prayed for an injunction to restrain that Company and the directors thereof “from disposing of, or dealing with, or concurring with the *London and Brighton Company* and the directors thereof or any other person or persons in disposing of or dealing with, the shares and debentures agreed to be applied in payment for the construction of the said line of railway and works under the said contract, or any of them, and from entering into any agreement, or doing, or causing to be done, any act, deed, matter, or thing whereby, or by means whereof, the said Messrs. *Peto & Betts* might be prevented or hindered from performing and carrying into effect the said contract.”

The Plaintiff *Filder* was cross-examined before a special examiner; when it appeared that he had purchased his stock in the year 1860, and the shares at a later period.

It also appeared that he had had many conversations with Mr. *Newman* (of Messrs. *Freshfields & Newman*, Sir *Morton Peto's* solicitors) before the Bill was filed, and that Mr. *Newman* had furnished him with the requisite information to enable him to institute the suit; but he denied that he had done so under Mr. *Newman's* advice.

On being pressed, he said:—“I had some conversation with Mr. *Newman* as to filing this Bill. It was well

known that I was opposed to any extension, to any payment of dividends out of capital, and to any increase of patronage to the directors; and from what Mr. *Newman* said, I gathered that I might effect my object without asking the shareholders for any contribution, in order to prevent any misappropriation of the funds of the Company by the directors;" and afterwards, "I gathered from Mr. *Newman* that I should not be put to any expense for the costs of my suit, and should be saved the trouble of asking the shareholders to contribute anything towards the expense. Mr. *Newman* said I should not be put to any expense. As one of the public, I know of the proposed line of railway from *Beckenham* to *Lewes* and *Brighton*. Sir *John Shelley* is the principal promoter. Messrs. *Freshfields & Newman* are the solicitors to that line. I have spoken to Sir *John Shelley* upon the subject of that line. I can't recollect whether or not I have spoken to him on the subject of this suit. I have no interest in the *Beckenham, Lewes, and Brighton Line*." And afterwards:—"I don't think I communicated with a single shareholder of the *London and Brighton Company* before I filed this Bill—I did not. I am aware that I filed this Bill on behalf of myself and all other the shareholders of the *London and Brighton Company*. I considered them as sheep led to the slaughter. £70 would not buy my interest in that line."

Q.—Have you any pecuniary interest in the *London and Brighton Railway* other than what arises from your holding the four 5*l.* shares and the £50 of stock?

"Witness refused to answer.

It appeared that the Plaintiff *Barchard* was one of the directors of the *Beckenham and Brighton Company* (a proposed line, which, if made, would be a competing line with the *Brighton Company*), and the Defendants swore that they

1863.
FILDER
v.
LONDON,
BRIGHTON, &
SOUTH COAST
RAILWAY COM-
PANY.
BARCHARD
v.
BRIGHTON,
UCKFIELD, &
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WELLS RAIL-
WAY COMPANY.
Statement.

1863.
 FILDER
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 LONDON,
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 WAY COMPANY.

Argument.

believed that he had been indemnified by the Chairman or the solicitors of that Company against the costs of this suit.

No evidence was given in opposition to this statement.

Mr. *Giffard* Q.C., and Mr. *C. M. Roupell*, for the motion of the Plaintiff *Filder*.

The Plaintiff is a bona fide shareholder in the Company, and the agreement is unquestionably ultra vires.

This is a very different case from that of *Forrest v. Manchester, Sheffield, and Lincolnshire Railway Company (a)*. In that case the Plaintiff was a mere puppet.

The VICE-CHANCELLOR.—This gentleman is in too doubtful a position for me to act at his instance at present. Let this motion stand over till I have heard the other.

Mr. *Giffard*, Q.C., and Mr. *Druce*, for the motion of the Plaintiff *Barchard*:

This suit is somewhat different from that of *Filder*. We have a right to call upon the Court to prevent the transfer of shares in our Company under the impugned agreement. If the agreement be invalid, this transfer will be illegal, and the Court will, therefore, prevent it from being carried out pendente lite. The shares have been all allotted in conformity with the agreement, but not yet transferred.

It cannot make any difference that the Plaintiff has a guarantee against costs. The case before the Lord Chancellor on which the Defendants rely, went far beyond a guarantee. There the Plaintiff had no liability to costs whatever, and no real interest in the question at issue.

Mr. *Rolt*, Q.C., and Mr. *J. H. Taylor*, for the *London Brighton, and South Coast Company*; and Sir *Hugh*

Cairns, Q.C., and Mr. Speed, for the Uckfield Company,
were not called upon.

1868.
FILDER
v.
LONDON,
BRIGHTON, &
SOUTH COAST
RAILWAY COM-
PANY.
BARCHARD
v.
BRIGHTON,
UCKFIELD, &
TUNBRIDGE
WELLS RAIL-
WAY COMPANY
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The most convenient and proper course to pursue in this case will be to make no order on either of these motions, and to let the costs be costs in the causes respectively.

Taking the case before the Lord Chancellor (*a*), and *Colman's case* (*b*) together, I think that the principle to be deduced from them is this : that, to entitle a shareholder to maintain a suit of this nature, the risk and responsibility must be upon him, so that the Court can feel that he is acting for the benefit, or what he believes to be the benefit, of the Company.

Primâ facie, every shareholder has a right to come here as representing all the shareholders, to prevent an act of this description ; and the Court does not require any evidence that the remaining shareholders, or any of them, have concurred in the filing of the bill ; because, if the act be illegal, it is presumed to be for the benefit of all that it should be stopped ; but if it is made to appear, and the attention of the Court is called to the fact, that the Plaintiff is not moving on his own behalf, but is set in motion by some one else who undertakes to pay the costs and to indemnify him against all risk, the whole aspect of the case is at once materially altered, because the suit is no longer under the direction of the Plaintiff ; but another person, whose interests may be utterly adverse to those of the Company, is in a position to control the proceedings.

What the Court looks to is this : is the suit bonâ fide the

(*a*) *Forrest v. Manchester, &c., Railway Co*, ubi supra.

(*b*) *Colman v. Eastern Counties Railway Co.*, 4 Railw. Cas. 513.

1863.
 FIDLER
 v.
 LONDON,
 BRIGHTON, &
 SOUTH COAST
 RAILWAY COM-
 PANY.
 BARCHARD
 v.
 BRIGHTON,
 UCKFIELD, &
 TUNBRIDGE
 WELLS RAIL-
 WAY COMPANY.

Judgment.

Plaintiff's own suit, or is he merely the hand by which some one else acts? And there is no ingredient entitled to greater weight in arriving at a conclusion on this point than the question, who is responsible for the costs of the suit? for it must be evident, that whoever is so is the person really most interested. Here I have simply the case of a gentleman having a perfectly nominal interest in the Company, who is indemnified against costs by a person interested in an adverse, in some sense a rival, Company.

On the question of convenience, I am clear that no inconvenience will arise from leaving this question to be determined at the Hearing; if this agreement be in fact illegal, the Plaintiff may succeed in getting rid of it then; but it is certainly not a case for an interlocutory injunction. It is by no means clear to me that I have any power to stop the directors from dealing, as they propose, with the shares; but, however that may be, I do not think that I ought now to interfere.

1862.

GLADSTONE v. MUSURUS BEY.

IN 1858 the Plaintiffs and others projected a Company to carry on banking business at *Constantinople*, under the name of the Bank of *Turkey*.

December 11th.

*Jurisdiction—
Ambassador—
Foreign Sovereign—Trustees
—Fund in
medio.*

Proposals were submitted to the *Turkish* Government resulting in a firman, or concession, which received the Sultan's assent on the 18th of May, 1858, and was accepted by the concessionaires on the 15th of February, 1859, on the understanding, as the Plaintiffs alleged, that the Sultan would withdraw all the existing kaimes, or paper-money, in his dominions, and that no further issue should be made during the existence of the Bank.

The firman granted the privilege of forming the Bank, and stipulated among other things that the Bank should not commence operations until the capital of £2,000,000 was paid; that that should be done within six months from the delivery of the firman; that the Bank should have the exclusive privilege of issuing Bank notes, to be a legal tender at *Constantinople*; and the Government engaged not to issue any description of paper-money, nor to accord or permit the exercise of any similar privilege in the empire to any persons or Company during the existence of the concession to the Bank. Other articles stipulated, that, in exchange for the firman, the grantees should pay as security for the perfect execution of the contract £20,000 in money or *Ottoman* securities to the *Turkish* Ambassador in *London*, to be deposited in the Bank of *England* on account of the *Ottoman* Government; the said security to be replaced at the disposal of the grantees, directly the Bank commenced its operations at *Constanti-*

Certain securities were deposited by the Plaintiffs in the Bank of *England* in the name of the Ambassador of a foreign state, in order to secure the performance of a contract between the Plaintiffs and the foreign Government. The Ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the Plaintiffs, which they denied under the circumstances to be such breach:—*Held*, that it was not competent for the Plaintiffs to move against the Ambassador; but that an interim injunction might be granted against the Bank to restrain them from parting with the fund, and that, under this order, the Bank would be protected against any proceedings by the Ambassador.

1862.
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 Statement.

nople, in conformity with the stipulations contained in the firman; that the Bank should commence operations within six months, at latest, after the delivery of the firman, and in default thereof the security of £20,000 should be confiscated in favour of the *Ottoman* Government.

After the settlement of the terms of the firman, but before its acceptance by the grantees, an additional article was insisted on by the grantees, as follows:—"The operations of the Bank shall commence three months after the withdrawal of all paper-money." This was indorsed on the firman, and signed by *Musurus Bey*, the *Turkish* Ambassador in *London*; and thereupon the Plaintiffs deposited £20,000 in *Ottoman* Bonds in the Bank of *England* in the name of *Musurus*, and proceeded to form a Company.

Ultimately, the Sultan refused to ratify the additional article, and, the *kaimes* not having been withdrawn, the majority of the shareholders in the Company had their money returned.

The directors of the Bank declined to commence business until the *kaimes* were withdrawn, and *Musurus* thereupon threatened to withdraw the deposited bonds as forfeited, unless the concessionaires would give up their firman.

This bill was filed by the Plaintiffs on behalf of themselves and all other persons interested in the £20,000 Bonds as concessionaires or as shareholders in the Bank of *Turkey* against *Musurus Bey*, the Bank of *England*, and the Sultan, and prayed a declaration that the £20,000 deposit had not become forfeited, and for an injunction against *Musurus* and the Bank of *England* to restrain the delivering of the £20,000 *Turkish* Bonds to any persons other than the Plaintiffs.

Notices of motion for injunction were served on the Bank of *England* and on the *Turkish* Ambassador.

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GLADSTONE
v.
MUSURUS BEY.
Argument.

Sir *Roundell Palmer*, S.G., appeared on behalf of the *Turkish* Ambassador, to protest against being summoned before the Court.

Mr. *Rolt*, Q.C., Sir *H. Cairns*, Q.C., and Mr. *Druce* for the Plaintiffs:—

The Court has jurisdiction in this case, because it is only asked to proceed against a fund in the hands of the Bank of *England*, which fund, as we say, belongs to the Plaintiffs. The mere fact of the Sultan, or his Ambassador, as his agent, claiming an interest in the fund, will not deprive the Court of jurisdiction over the money. They have, therefore, been made parties, and have the option of appearing if they think it desirable. If they do appear, I can establish a clear equity against them; and on their appearing the Court would have jurisdiction to administer the fund so as to bind them: *Duke of Brunswick v. King of Hanover* (a). Suppose an Ambassador here had trust moneys deposited in the Bank in his name as trustee of a settlement, is it to be said that the trusts are not to be administered because the Ambassador is personally privileged? The fund is not privileged. The rule that applies to a foreign Sovereign applies to an Ambassador as his agent equally.

If the Ambassador thinks he is entitled to rely on his privilege, he should have demurred, and ought not to appear on the motion to protest against its being heard. We are entitled to state the case, and then the Amba-

(a) 6 Beav. 1, 39; 2 H. L. Cas. 1.

1862.
 GLADSTONE
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 ———
Argument.

sador can either decline to appear, or else submit to the jurisdiction, and be heard in his defence.

The VICE-CHANCELLOR said, that he thought a great mistake had been made in making the Ambassador a party to the suit. Since the well-known case of the Ambassador of the Czar of *Muscovy* and the Statute which was passed in the reign of Queen *Anne* (a), there had been no instance of an attempt to make an Ambassador a party to a suit. All that could be done in this case was, to say that the Court declined to entertain any jurisdiction against the *Turkish* Ambassador.

The motion against the Bank of *England* was then opened.

Mr. *Rolt*, Q.C., Sir *H. Cairns*, Q.C., and Mr. *Druce* for the Plaintiffs :—

The case stated by the Bill, and proved by our affidavits, is that the *Turkish* Ambassador, on behalf of the Sultan, agreed to the additional article that the Bank should not be bound to commence business until three months after the withdrawal of the *kaimes*. On the faith of this stipulation the Company was formed, and was only prevented from commencing business by the bad faith of the *Turkish* Government in committing a breach of their contract by not withdrawing the old *kaimes*, and by making further issues. No default has occurred on the part of the concessionaires for the Company, and the *Turkish* Ambassador has no right to withdraw the deposit which has been made in his name.

These facts being proved and undisputed, we ask that the Bank of *England*, who are the stakeholders, may be

(a) 7 *Anne*, c. 12.

restrained from giving up the deposit. It is true, that many of the shareholders have claimed to have their money returned when they found that the *Turkish* Government would not keep faith; and it has been said by the *Turkish* Ambassador that the Company is wound up, and therefore the deposit forfeited. But this is not so. The Company is not wound up; and if it were, the rights of the concessionaires under the firman would remain intact.

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—
Argument.

The rule as to suits affecting foreign Sovereigns is this, that there is no jurisdiction against them when acting politically, but there is jurisdiction in matters of contract, where they enter into engagements as any private person might do: *Secretary of State for India v. Kamache Boye Sahaba* (a). For example, if a foreign Sovereign desired a railway to be made, and agreed to pay the contractor a certain sum for making it, and, for the purpose of securing the payment, to deposit security in an *English* bank, would it be open to him, after the railway was made, to refuse payment, and to insist that this Court had no jurisdiction over the securities deposited in this country? It is true, that the Sovereign cannot in such a case as this be compelled to appear, but the fund in the hands of the stakeholder is answerable to the jurisdiction of the Court.

The real object of the *Turkish* Government is apparent in the correspondence in evidence, and is to establish another Bank on more favourable terms; and for that purpose the *Turkish* Government refuse to perform the contract they have entered into with us.

Enough, at any rate, is proved to make out that there is a question to be tried at the Hearing, when the Sultan will have an opportunity of appearing, and that entitles us to keep the fund in medio.

(a) 18 Moore, P.C., 22.

1862.

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v.
MUSURUS BEY.*Argument.*Mr. Cotton, for the Bank of *England* :—

It is not disputed that the *Turkish* Ambassador has a legal right to withdraw these securities from the Bank. The *Turkish* Ambassador is not before the Court, and in his absence it is impossible that any injunction can be granted against the Bank which would leave them without protection against the legal claim of *Musurus Bey*. The Bank are not the agents of the *Turkish* Government, but merely bankers, holding a fund to the order of *Musurus Bey*, who is not, and cannot, be made a party to the suit. [He referred to *Wadsworth v. Queen of Spain (a)*.]

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have no doubt that I ought to grant an interim injunction, because the real question is, whether there is such a case to be tried at the Hearing that this fund ought to be kept safe in the meantime. If there is, I am bound to keep the fund safe, unless, by so doing, and under the very peculiar circumstances of this case, I should be making an order against the Bank of *England*, from the consequences of which I am unable to protect them. The Bank of *England* are brought here as the holders of a fund, which, it certainly must be taken on the Bill (and there is no doubt of it, I apprehend, in point of law), could be withdrawn from them by an order signed by the *Turkish* Ambassador. The Bill is then filed, stating what the facts are with relation to this deposit. If the bonds were the absolute unqualified property of the Sultan—that is to say, of the *Turkish* Government, there might be some difficulty in attempting to enforce any claim against the Sultan by attaching this fund. You cannot proceed against the Sultan's property

by way of arrest, so as to bring the Sovereign within the jurisdiction of the Court, or by way of execution or the like. But that is not what this Bill asks. The shape in which the case is put by the Bill is, that this property in the eye of the Court is not the property of the Sultan, that it is a fund in medio, which is in one contingent event to become the Sultan's property, and in another contingency to become the Plaintiffs', that it is, therefore, a fund in which both the Sultan and they have contingent interests. It is, in fact, exactly analogous to the case put by Lord Langdale in his judgment in *Duke of Brunswick v. King of Hanover* (a), though arising in a different form. There is a fund which may in event A. become the property of the Plaintiffs, and in event B. become the property of the Sultan; and if the Sultan should think fit to appear, the Court may ultimately have to determine which of the two has the better right. That is how the case stands. Upon the facts as now presented I cannot say, that, at the Hearing, if the *Turkish* Government should think it right to intervene, there may not be a point to be argued upon the effect to be given to the additional article under all the circumstances that may be proved. As stated in the Bill, the original concession stipulated for a deposit of £20,000 (merely as security for the perfect execution of the contract) in the name of the *Turkish* Ambassador in *London*, and provided that the security should be replaced at the disposal of the grantees of the concession as soon as the Bank commenced its operations at *Constantinople* in conformity with the stipulations contained in the contract. The next article says, that unless the Bank is established within six months after delivery of the firman, the security is to be confiscated in favour of the Government. Then the concessionaires declined to sign an acknowledgment that they accepted the firman without the insertion of an additional

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v.
MUSURUS BET.
Judgment.

(a) 6 Beav. 39.

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GLADSTONE
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MUSURUS BEY.
—
Judgment.

article, that the Bank was not to commence business until three months after the paper money then in circulation should have been withdrawn, even though that might be long after the expiration of the stipulated period of six months. This additional article was signed by the Ambassador of the *Turkish* Government, and the signature by way of acceptance of the firman of the present Plaintiffs comes after that additional article, and after the signature of the *Turkish* Ambassador. Upon that state of facts, there is at least a question to be tried whether that article is or is not part of the original agreement. If so, on the fact stated here (the truth of which seems really undisputed,) that the paper money has not at the present moment been withdrawn, it would seem that the time has not arrived at which the deposit could be confiscated. Then there is the averment, supported by the correspondence, that this fund is about to be claimed by the *Turkish* Ambassador unless the Plaintiffs will consent to give up the concession altogether. In justice to the *Turkish* Ambassador, as he is absent, I am bound to say that on this correspondence he states that the Government do not wish to avail themselves of the money, but say that the money is at the disposal of the Plaintiffs provided they will give up their concession. It does not appear to me at present on the materials before me, that the Plaintiffs are bound to give up that concession as a condition for preventing the confiscation of the deposit. They say, we will abide by our concession at present, and when the paper money is withdrawn from circulation it will be for us to say whether the Bank is to be started or not, but in the meantime we are under no obligation.

The only doubt in my mind—and that, too, is a doubt that may have to be determined, and may be a serious one at the Hearing, should all the parties come before the Court—is whether or not the proceedings that took place as to

what is called the winding-up of the concern, amounted to such an abandonment of the concession as to entitle the *Turkish* Government to treat the concession as abandoned by the Plaintiffs. That will be a matter to be argued and determined at the Hearing; but I cannot say, on the evidence before me, that it is clear that that would be the result. Then, if so, it is not right that this £20,000 should be, as it may be to-morrow unless steps are taken to prevent it, withdrawn by the order of the *Turkish* Ambassador. The case may well be supposed of a foreign Ambassador here accepting the trusts of a marriage settlement, it may be as sole trustee. If the trust funds were invested in his name in the Bank of *England*, it is quite true I could not deal with him on account of the impossibility of any process being had against an Ambassador. But the funds being in the Bank of *England*, it appears to me clear that I could in such a state of circumstances (this being a fund vested in the Ambassador absolutely, and accepted by him upon certain trusts) prevent the Bank of *England* from handing it over to the Ambassador, upon a distinct intimation on his part that he intended to apply it to his own use. I assume such a fact hypothetically, because we are entitled to assume any fact to try the validity of the argument founded on the absence of the Ambassador. So also in this case, it appears to me, that though I cannot hold this gentleman here, because he is an Ambassador, yet the fund being here, this Court has jurisdiction to prevent that fund being wasted, and perhaps all the more on account of the impossibility of withdrawing the fund from the hands of the Ambassador if once it reaches them. Therefore, all that remains is to consider whether the Bank of *England* will be protected by this order. It appears to me that the Bank will be amply protected, because, if the *Turkish* Ambassador should present his cheque, the Bank, under the order of this Court, would decline to honour it;

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 v.
 MUSURUS BEY.
 —
Judgment.

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MUSURUS BEY.
—
Judgment.

and the only mode in which the Ambassador could compel payment, would be by taking some process of his own. I feel a very strong opinion, that, if he chose to take that course, the position of things would be entirely altered. He would be submitting himself to the jurisdiction of our tribunals; and in that case *English* tribunals would have the power of saying, for that purpose only, that they would administer justice between all parties concerned in a litigation which he had himself commenced.

Where the intention to commit a breach of trust is charged against a person who happens to be out of reach of the process of the Court, the Court does not hesitate, on a proper case being made, to preserve the trust fund in medio by an interim order until the hearing of the cause. The holder of the fund would be protected by the interim order in such a case, and I think the Bank will be equally protected in this case, though the absence of the alleged trustee is due to his privilege as an Ambassador. I think, therefore, I ought to make an order restraining the Bank of *England* until the Hearing or further order, in the terms of the prayer of the Bill, except that the injunction must be against payment to any one, without adding the words, "other than the Plaintiffs," it being clear that the money ought not to be delivered to them, otherwise than under the direction of this Court.

Minute.

INJUNCTION to restrain the Bank of *England* from delivering the £20,000 Turkish Bonds to any person or persons whomsoever until the Hearing or further order.

GLADSTONE v. OTTOMAN BANK.

THIS case came on upon demurrer. The Bill was filed against the *Ottoman Bank* and its directors and the Sultan of *Turkey*. The material statements of the Bill were as follows:—

The Plaintiffs and others, in the year 1858, projected the formation of a Bank to carry on business in the *Turkish* empire under the style of the *Bank of Turkey*, and proposed that the Sultan should concede to them the exclusive privilege of issuing notes in his dominions, and should withdraw from circulation all the kaimes or paper money then in existence in *Turkey*.

The scheme was approved by the *Turkish* Government; and the approval was communicated to the Plaintiffs, with an assurance that the Sultan would undertake, as a condition precedent to the Company commencing business, to withdraw all the kaimes from circulation.

On the 18th of May, 1858, the Sultan gave his assent to a firman, by which the exclusive privilege of issuing notes, to be a legal tender at *Constantinople*, was granted to the *Bank of Turkey*; and the *Turkish* Government engaged not to issue any paper money, nor to concede or permit the exercise of any similar privilege in the empire to any person or Company during the existence of the concession to the said Bank.

Before the acceptance of the firman by the Plaintiffs, an additional article was indorsed and signed by the *Turkish* Ambassador, by the express authority and on behalf of the *Turkish* Government, stipulating that the operations of the Bank should commence three months after the withdrawal of all paper money.

The *Bank of Turkey* was formed, but the paper money had not been withdrawn, and the Bank had not commenced business.

1863.

Feb. 26th, 27th.

Foreign Sovereign—Jurisdiction—Fraud.

A Bill filed against the *Ottoman Bank*, its directors, and the Sultan, alleged that the Sultan's Government had granted to the Plaintiffs the exclusive right of issuing bank notes in *Turkey*, and had subsequently, in derogation of that grant, made a similar concession to the Defendants, the *Ottoman Bank*, and prayed a declaration of the Plaintiffs' exclusive right, and an injunction against the *Ottoman Bank* and its directors:

—*Held*, on the demurrer of the Bank and directors, that, inasmuch as the Court had no jurisdiction on the contract as against the Sultan, it had none against the Bank and its directors, and demurrer allowed accordingly.

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GLADSTONE
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OTTOMAN
BANK.
Statement.

The breach complained of was stated in the 34th paragraph as follows:—

The Plaintiffs have lately discovered, as the fact is, that the Defendants, the *Ottoman Bank*, who are a Joint Stock Company incorporated by charter, and who carry on business in *Bank Buildings*, in the City of *London*, have recently concerted a scheme for supplanting the Bank of *Turkey*, and obtaining for their own use the sole privilege of issuing notes or paper money within the *Turkish* dominions, and of depriving the Plaintiffs and the shareholders in the Bank of *Turkey* of the benefit of the concession granted to them as aforesaid; and with that view the *Ottoman Bank* and the directors thereof have applied to the *Turkish* Government for a concession to enable them, in conjunction with other persons whose names are unknown to the Plaintiffs, to establish a Company for the purpose of carrying on banking business at *Constantinople* and in *London*, which Company is intended to be formed with a joint stock capital of £2,700,000 in 135,000 shares, under the style of the Imperial Bank of *Turkey*; and the *Turkish* Government has, at the instance of the *Ottoman Bank*, agreed to grant to them a concession for the purpose, together with the sole and exclusive privilege of issuing paper and bank notes, which are to be a legal tender within the *Turkish* dominions; and a concession with such sole and exclusive privilege as aforesaid has been already granted by the said Government to the *Ottoman Bank* or their nominees, which concession confers or purports to confer on the *Ottoman Bank* privileges identical with those granted by the concession to the Plaintiffs.

The Bill prayed a declaration, that, so long as the Plaintiffs' concession was in existence, the Bank of *Turkey* was entitled to the exclusive privilege of issuing bank notes or paper money in the Empire of the Sultan, and that the concession of the *Ottoman Bank* was inoperative against the Plaintiffs; and also an injunction to restrain the *Ottoman Bank* and

its directors from issuing notes or paper money for circulation in the Sultan's dominions.

No consequential relief was prayed against the Sultan.

Both the *Ottoman Bank* and the Defendants, the directors, demurred to the Bill.

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OTTOMAN
BANK.
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Sir *H. Cairns*, Q. C., and Mr. *Wickens*, for the demurrer of the *Ottoman Bank*, and the *Solicitor-General* (Sir *Roundell Palmer*), Mr. *Giffard*, Q. C., and Mr. *Wickens* for the demurrer of the Directors :—

Argument.

This is a Bill to restrain us from carrying out an agreement with the Sultan, on the ground that the Plaintiffs hold a previous concession from the Sultan, which gives them, as they allege, an equity against the Sultan. With the Plaintiffs' agreement we have nothing to do, and the only way in which we could be reached would be by their suing the Sultan as a party, and obtaining an injunction against him, to prevent him from carrying out our agreement. This the Plaintiffs seem to have known was impossible, because the agreement under which we are acting was an agreement entered into by the Sultan in his political capacity relating to the prerogative of issuing paper money, and cannot be the subject of a suit in this Court against the Sultan: *Duke of Brunswick v. King of Hanover* (a), *Emperor of Austria v. Day* (b). The allegations of the Bill are, that the Sultan has granted the exclusive privilege of issuing paper money in *Turkey* to the Plaintiffs, and that we are the Sultan's agents for carrying out a different agreement in breach of the Plaintiffs' privilege. If this is so, the agent cannot be sued in the absence of the principal, who is bound by the alleged equity, and the Sultan, though he is made a nominal party, cannot be sued in this Court.

(a) 2 H. L. Cas. 1.

(b) 2 Giff. 628; 3 D. G. F. & J. 217.

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BANK.*Argument.*

Mr. Rolt, Q.C., and Mr. Druce, for the bill :—

The contention on the other side is this—that one *British* subject may be a party to a fraud upon another *British* subject, if he acts under the direction of the Sultan, who cannot be made amenable to this Court.

Our position is this: The privileges granted to us by our concession are rights of property vested in us. The Sultan attempts to defraud us of this property; and though the Court may not be able to reach him, it will protect our property against any persons within the jurisdiction of the Court, who are aiding and abetting in the fraud. There is a distinction between a contract entered into in derogation of subsisting rights, and acts done in such derogation. The Court might not be able to prevent the Defendants from entering into their contract; but it can and will prevent *British* subjects from doing any acts by which we may be deprived of the property we have acquired. Suppose the two inconsistent contracts had been entered into, not by a foreign sovereign but by a *British* subject abroad, who could not be reached by the process of the Court—would he be allowed to complete his fraud by the agency of persons within the jurisdiction of this Court? If *A.* grants an exclusive right to *B.*, and then grants the same right to *C.* and goes out of the jurisdiction, can it be said that *B.* has no equity to restrain *C.* from infringing his right?

The Bill further alleges, that the Defendants were aware of our vested rights when they took their own concession. If, in the case supposed, *C.* could do no act if *A.* were restrained, the only relief would be against *A.*, but if *C.* was in a position to act without *A.*, then there would be an independent injunction against him; and this may be granted whether *A.* is or is not within the reach of the Court. To refuse to interfere in such a case would be to refuse protection to the property of *B.* The mere fact that

the Court is unable to give complete relief against every one concerned, will not prevent it from restraining a wrong contemplated by a person who is amenable to the Court: *Lumley v. Wagner (a)*, *The Messageries Imperiales v. Baines (b)*.

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GLADSTONE
v.
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BANK.
Argument.

So when a vendor sells to *A.*, and then sells again to *B.* with notice, and *B.* does some act to interfere with *A.*'s right, the Court will restrain *B.* no less than the vendor: *Goodman v. Fielding (c)*.

Then it is said, that the subject matter of the contention belongs to the Sultan's prerogative. But that is immaterial after we have acquired a right of property, and therefore a right to be protected against persons within the jurisdiction of the Court. A patent grows out of prerogative right (limited by the statute of monopolies and by later Acts); yet the Court restrains infringements by the grantee of a second patent.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I cannot entertain any doubt upon this Bill. It is rather a bold attempt, and has been supported very ably indeed by the arguments on behalf of the Plaintiffs; but I think it is quite clear that an engagement entered into with a foreign Government such as that upon which the Plaintiffs' rights depend, is not an engagement which the Court can enforce, or against the breach of which it can give any relief. The Bill states throughout—consistently no doubt with the fact—that this grant, upon which the Plaintiffs rest their claim to relief, is the act of a foreign Government. The first statement of it is, that a scheme was entered into for establishing a Company for circulating notes in the dominions of the Sultan of *Turkey*; that the scheme

Judgment.

(a) 1 D. G. M. G. 604. (b) 11 W. R. 322. (c) 4 D. M. G. 90.

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BANK.

Judgment.

was approved by the Government in the name and on behalf of his Imperial Majesty about the month of March, 1858; that such approval was communicated, on behalf and with the authority of his Imperial Majesty, to the Plaintiffs, the projectors of the Bank, with an assurance that the Sultan would undertake, as a condition precedent to the Company's commencing the business of the Bank, to withdraw from circulation the whole of the kaimes or paper money which were then current in his kingdom. The Government, it is said, communicated to the projectors of the Bank, that his Imperial Majesty would secure to certain concessionaires who are represented by the Plaintiffs such rights and privileges as were required for the purposes of the projected Company by an Imperial firman or concession. Then follows the concession which was granted by the Sultan, giving to these Plaintiffs the exclusive privileges which they now claim. Now standing upon that right, the Plaintiffs raise this case: They say, that this Court, acting upon the jurisdiction which it always exercises over contracts, will not suffer anyone to do anything in derogation of his contract; and it is further contended on the authority of *Lumley v. Wagner* and other like cases, that the Court, acting upon the same jurisdiction, will prevent a third person, with knowledge of the contract, from assisting either of the parties to it to defeat his own engagements. Without expressing any opinion on this point, it is enough to say, that these are the principles on which the Court is now asked to act in a case where the agreement is with a foreign sovereign.

Now, unless the Court is prepared to hold that this is a contract which it can enforce against the principal, it seems to me impossible (inasmuch as all the rights of the Plaintiffs stand upon the contract) to hold that, if the same sovereign power chooses to act in derogation of the right granted by the first sovereign act, I can interfere with the sovereign

power itself to prevent an act in derogation of it. But if I cannot interfere with the principal, how can I interfere with the accessory, namely, the person who is alleged to be aiding in defeating the rights which the sovereign power has granted by the first concession. That the grant operates through the medium of the sovereign power of the *Ottoman Empire* acting for state purposes there can be no question. Mr. *Rolt* attempted to draw a distinction between the act of a sovereign doing something for his own benefit, and the act of what is called the legislature, where a legislature exists; but the fact that the sovereign has the control of the money current in his kingdom only amounts to this: that it is a privilege enjoyed by him for the public purposes of his country. The right of ascertaining what shall be the current coin of the kingdom is vested in the sovereign of the country, but that right, like every other right which he holds quâ sovereign, is presumed to be exercised for the benefit of the community upon public grounds. This is not a contract for the private benefit of the sovereign, of which this Court might take cognizance, but simply a grant of the sole right of issuing notes as part of the current coin of his realm, made by the Sultan in his public capacity as the sovereign of the country.

1863.
GLADSTONE
v.
OTTOMAN
BANK.
Judgment.

That being the nature of the contract, what is the alleged breach? It is thus put in the 34th paragraph of the Bill. The Plaintiffs say they have lately discovered, as the fact is, that the Defendants the *Ottoman Bank*, who are a *London Banking-house*, have recently concerted a scheme for supplanting the Bank of *Turkey*, and obtaining for their own use the sole privilege of issuing notes or paper money within the *Turkish dominions*, and for depriving the Plaintiffs and the shareholders in the Bank of *Turkey* of the benefit of the concession granted to them; that with that view the *Ottoman Bank* and the Directors thereof have applied to the *Turkish Government* for a concession to enable

1868.
 GLADSTONE
 v.
 OTTOMAN
 BANK.
 Judgment

them, in conjunction with other persons whose names are unknown to the Plaintiffs, to establish a Company for the purpose of carrying on banking business at *Constantinople* and in *London*, which Company is intended to be formed under the style of the *Imperial Bank of Turkey*, and that the *Turkish* Government has, at the instance of the *Ottoman Bank*, agreed to grant to them a concession for these purposes, together with the sole and exclusive privilege of issuing paper and bank-notes, to be a legal tender within the *Turkish* dominions; and that a concession with such sole and exclusive privilege as aforesaid, has been already granted by the Government, conferring the same privileges as were conferred by the grant to the Plaintiffs.

I do not think, in the view I take of the case, that it is necessary to inquire whether the first grant has been annulled or not by subsequent proceedings. I will assume that it is still in force, and that a second grant has been made inconsistent with it, by the same Sovereign power which granted the first. Suppose there was an Act of Parliament granting to the Bank of *England* the exclusive right of issuing bank notes which should be a legal tender throughout the country; and suppose another Act of Parliament was passed which granted the same privileges to some other Company. In such a case as that, this Court could not possibly interfere. It is not as it was put in argument, that individuals are to be protected in breaking the law, with the assistance of foreign authority, and by force of the grant of a foreign sovereign; but that those who depend upon the grant of a foreign sovereign cannot obtain the aid of this Court against the act of the foreign sovereign in making a second grant inconsistent with the first. It is the act of a foreign sovereign power which overrides everything. In reading the charges of fraud or impropriety contained in the thirty-fourth paragraph, viz., that the Defendants concocted a scheme for obtaining a concession

from the *Turkish* Government, one's mind is brought back to those cases in which this Court has been asked to restrain persons from applying for an Act of Parliament inconsistent with some rights vested in the Plaintiffs. The Court always says, it cannot interfere to prevent persons from applying to the Legislature, the sovereign power, to grant anything they please; nor is it competent to this Court to restrain any gentleman from applying to the Sultan of *Turkey* for a concession, any more than I could restrain them from applying to our own Legislature for an Act of Parliament; nor, after the grant is made, can I interfere to prevent them from using the grant made by the same sovereign authority. I cannot conceive where applications of this description would end, if they were once acceded to. Railroad concessions would come within the same principle. Assuming, for the sake of argument, that the Bill sufficiently avers that the concession to the Plaintiffs has never been revoked, or, if we suppose in an analogous case, that our Legislature has made two inconsistent enactments, has granted the right to one *English* railway company to make a railway from one place to another, and has afterwards granted the same right to a second railway company, how could I restrain that second railway company from constructing the railway? I might go much further, and take the case of a country like *Turkey*, or any other sovereign power which might choose to give to *English* merchants in general the sole right of trading to any port of their dominions; could the *Attorney-General* of this country proceed against some *Italian* or *Frenchman* residing in this country, and subject to the jurisdiction of this Court, to prevent him from sending a ship to that country? It seems to me it is impossible to hold, that this Court has jurisdiction to interfere with any step which the *Ottoman* Government may take in this matter according to its own sole will and discretion. Therefore I am bound to allow the demurrers.

1863.
 GLADSTONE
 v.
 OTTOMAN
 BANK.
 Judgment.

1863.

Nov. 2nd.

Practice—Answer—Discovery.

The rule, that a Defendant who elects to answer must answer fully, though subject to certain specified exceptions, applies to a case where the defence consists of a pleadable point not pleaded, and where the discovery, assuming the case made by the Bill and denied by the answer to be substantiated, would or might be material to the relief to be obtained at the Hearing.

SWABEY v. SUTTON.

THE Bill stated, that, upon the marriage of the father and mother of the Plaintiff, two indentures of settlement, dated on or about the 15th June, 1829, were executed, settling certain large sums for the benefit of the parents for their respective lives, with remainder for the benefit of their children in the usual way.

It further stated, that the Defendants *Robert, James, William, and Wadham Sutton*, had been appointed and were trustees of these settlements, and had received considerable sums of money in respect thereof, which or some part thereof were then in their hands subject to the trusts of the settlements.

The ordinary interrogatories were founded on these allegations, and the Defendants above named were called upon to set forth an account of all moneys come to their hands subject to the said trusts.

The Defendants twice applied for and obtained further time to answer; and on the 31st July, 1863, they filed a joint and several answer, in which they stated that there was no such indenture as that stated in the Bill; and they set forth an indenture, dated 19th March, 1829, which, as they stated, was the settlement made upon the marriage of the Plaintiffs' parents, and of which *Robert and James Sutton* and one *Phillpotts* were the trustees. Under the trusts of that deed the fund was settled upon the Plaintiffs' mother for life, with remainder among her children, as she and her husband or the survivor should appoint, and in default of appointment equally.

The answer then stated the death of the husband, without having made any joint appointment, and that the widow, on the 31st July, 1863, had executed an irrevocable ap-

pointment of the entire fund, absolutely excluding the Plaintiff.

The Defendants submitted, that, under these circumstances, the Plaintiffs had no interest in the settled fund, and that they were not bound to set forth any account.

To this answer the Plaintiffs excepted.

After the exceptions had been filed, but before they were argued, the Defendants *Robert* and *James Sutton* died; but all parties agreed that the exceptions should be argued as if they had been exceptions to the answer of *William* and *Wadham Sutton* merely.

1863.
SWABBY
v.
SUTTON.
Statement.

Mr. *Angelo Lewis* for the exceptions:—

Argument.

The Defendants not having pleaded that we have no interest, must answer as if we had established our claim: *Reade v. Woodroffe* (a).

The appointment which they set up to defeat us was not executed till after they had twice obtained time to answer: *Lynch v. Leceane* (b).

Mr. *Rolt*, Q. C., and Mr. *Dickinson*, for the answer:—

Part of the exception must certainly be overruled, therefore it must all be so.

The VICE-CHANCELLOR.—That used to be so in cases of impertinence, not of insufficiency.

Mr. *Rolt*.—Here we deny two different points, and must have pleaded both; but double pleading is not allowed in equity. We say, 1st, There is no such settlement; 2ndly, The Plaintiff has no interest under any settlement.

We are not called upon to answer when the discovery, if supplied, would be inconsistent with the Plaintiff's case:—*De la Rue v. Dickinson* (c).

(a) 24 Beav. 421. (b) 1 Hare, 626. (c) 3 K. & J. 388.

1868.

SWABBY

v.

SUTTON

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The old rule was very strict, that a Defendant who elects to answer must answer fully: this has been dispensed with where it has been seen plainly that the point raised is one which must be determined at the Hearing; and that the discovery will be unnecessary for the purpose of the Hearing, and useless if the decision be in one way; and in a case (a) where there was a *prima facie* right to an account, but it was evident that the result of the account would not affect the question to be decided at the Hearing, I have refused to enforce the discovery: and the same course has been taken in cases like *Adams v. Fisher* (b), where a mere creditor claimed to have a discovery of the title deeds of the testator's whole estate, and the Court refused to permit him to do so. But this is a totally different case, and I see no reason for taking it out of the general rule.

If you choose to rest on a short point, you must do so by plea; or if not, you must answer; but then you must meet the way in which the Plaintiff puts his case, and must answer fully everything which, if answered according to his view, would assist him at the Hearing. Here the Plaintiff says, he is not aware of the exact nature of the instrument, but he gives its date approximately, and then inquires of the Defendants whether they have not received moneys in respect of that indenture, or of some other and what indenture, &c., in the usual terms: and they say "there is no such indenture;" (but then there is an indenture something like it, under which the Plaintiff takes an interest): then they proceed to say, that, after the father's death, the mother made a will, by which she excluded the Plaintiff from all interest in this fund; and that since the Bill was filed she has executed a deed having the same effect. That would require much examination at the Hearing. It is clear I cannot

(a) See next case.

(b) 3 My. & Cr. 526.

listen to a statement that there is no such indenture: a mere mistake of the date will not deprive the Plaintiff of his right to discovery, the Defendants not denying that they were trustees of some indenture; and although they proceed to set out an indenture which does not contain their names, they do not pledge their oath that they are not trustees.

It seems to me, that, under these circumstances, the Plaintiff is entitled to have an answer to his interrogatory. It would have been exceedingly easy to have traversed the allegations in the Bill if the facts allowed it.

1863.
SWABBY
v.
SUTTON.
Judgment.

LETT v. PARRY (a).

THIS was the hearing of a number of exceptions to the answer of the Defendant.

The Plaintiff was a *London* solicitor, who had acted as town agent of the Defendant (a country solicitor), both before and since the date of the agreement referred to in the Bill.

The Bill stated that a large sum of money being due to the Plaintiff on his agency bills, he brought actions for the purpose of recovering the same; and that such actions were compromised by an agreement, whereby the Plaintiff agreed to accept a sum much less than that claimed; and that in consideration therefor the Defendant agreed to give the Plaintiff the whole of his *London* agency, and to discontinue the employment of all other agents, and not himself to act as a *London* solicitor, either on his own account or as agent for others; and particularly to close an office in *Serjeant's Inn, Fleet Street*, where he had previously

Where the Bill prays alternative relief, and the Plaintiff would only be entitled to the discovery asked for under one of the alternatives, which is not the one principally relied on by the Bill, and the information desired could not be material for the purpose of determining to which of such alternatives the Plaintiff is entitled, such discovery will not be compelled before the Hearing.

1861.
Nov. 6th.
Pleading—
Exceptions—
Right to
Account.

(a) This seems to be the case See also *Mansell v. Feeney*, referred to by his Honour in 2 J. & H. 320.
Swabey v. Sutton, ante, p. 516.

1861.

LETT

v.

PARRY.

• Statement.

transacted business as a *London* solicitor on his own behalf.

The Bill then assigned various breaches of the said agreement, particularly by the transaction of business at the said office in *Serjeant's Inn*, and prayed that the agreement might be put an end to, and the parties remitted to their original rights; or if not, that the Plaintiff might be declared entitled to be paid for all business transacted by the Defendant in *Serjeant's Inn*, or for him by any other *London* agent, as if he (the Plaintiff) had acted as such agent in the said business, and for an account of such business.

The interrogatories, amongst other things, asked for this account. The Defendant, by his answer, submitted that he was not bound to set forth the accounts; and such refusal was the subject of the third of these exceptions.

Argument.

Mr. *Giffard*, Q.C., and Mr. *A. E. Miller*, for the exceptions.

Mr. *Hugh Williams*, for the answer.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD, after allowing the other exceptions, said—

As to the third exception, the Plaintiff has shown a *prima facie* right to the account asked for; but it is plain that the information, if supplied, could be of no use to him before the Hearing.

If he succeed in the suit, he must obtain one of two decrees:—Either the agreement will be then rescinded, in which case he will not be interested in this business at all; or else the account he now desires will be directed by the decree. In neither case can he want this discovery now.

Neither allow nor overrule this exception.

1863.

IN RE HAMPSTEAD JUNCTION RAILWAY,

EX PARTE BUCK.

THIS was a motion to vary the certificate of Mr. *Bloxam*, made under the common order for the taxation of a landowner's bill of costs as against the *Hampstead Junction Railway Company*.

The Petitioners in this case were owners of the freehold of a number of small houses in *Kentish Town*, the sites of which had been let for building by a lease reserving an aggregate ground-rent.

The *Hampstead Junction Railway Company* obtained their Act in the Session of 1853, and they had, as they required some of these houses for the purposes of their undertaking, served the owners with the usual notices prior to their application for a Bill.

Thereupon the Petitioners opposed the Bill in Parliament; but the opposition was afterwards withdrawn in consequence of an agreement, dated August 19th, 1853, and come to between the agents of the parties.

This agreement was in the following terms:—

“ At the close of the Session of Parliament in 1853, when the Petitioners were opposing this Bill in the House of Lords at the last day of the Session, the following agreement was entered into between Mr. *Langley*, the solicitor for the freeholders, and Mr. *Tite*, the surveyor on behalf of the Company:—

“ It is agreed between *William Henry Langley* and *William Tite*, Esquires, the first on behalf of Mr. *Buck*, and the latter on behalf of the *Hampstead and City Junction*

Nov. 19th.

Lands Clauses Act, 1845, ss. 80, 82,—Apportionment of Ground-rents—Costs.

Where there is a bargain between the ground landlord of houses let at a gross ground-rent, and a Railway Company who have taken some of the houses, for the payment of compensation at so many years purchase on the rents of the houses taken, the costs of apportioning the ground-rents between the houses taken and those left are not payable by the Company under the *Lands Clauses Consolidation Act, 1845, s. 82.*

Semble, they would have been so payable had the matter come under s. 80.

1863.

IN RE HAMP-
STEAD JUNK-
TION RAILWAY,
EX PARTE
BUCK.

—
Statement.

Company, that the Company shall pay for property required a sum equalling thirty-five years' purchase on the ground-rent; all questions of collateral damage to the estate and value of reversion (if any), to be decided by arbitration or a jury, as Mr. *Buck* may prefer; Mr. *Buck's* costs, not exceeding £200, to be paid by the Company. The Company not to use the arches for storing manure or coals."

The costs referred to in the agreement were the costs of the Parliamentary opposition.

In order to carry out this agreement, it became necessary to apportion the ground-rents between the houses taken by the Company and those not so taken; and, in making this apportionment, the Petitioners incurred considerable costs, the principal item being a sum of £21 paid to their surveyors as a fee for their services. The apportionment was embodied in a deed to which the Company was a party, wherein the various houses taken by the Company, and the apportioned part of the ground-rents attributed to such houses, were specified in detail in a schedule.

This deed contained the following clause:—

"And it is hereby further declared and agreed, that the said Company shall bear and pay all and singular the costs, charges, and expenses of and incident to the preparation of these presents and the execution hereof by the several parties hereto."

The solicitors of the Petitioners delivered to the Company a bill of costs, including all the charges and expenses aforesaid, which the Company declined to pay, on the ground that they were not costs incident to the preparation of the deed. Thereupon, the ordinary petition was presented by the landowners for taxation of the bill as against the Company, in accordance with the provisions of the Lands Clauses Consolidation Act; and on the 24th of

March, 1863, the common order for taxation was made at the Rolls.

The Taxing Master disallowed all the costs of the apportionment, except the mere costs of drawing, settling, engrossing, and executing the deed itself.

This motion was now made by way of appeal from such disallowance.

1863.
IN RE HAMP-
STEAD JUNC-
TION RAILWAY,
EX PARTE
BUCK.
Statement.

Mr. *Giffard*, Q.C., and Mr. *F. H. Colt*, for the motion :—

Argument.

The question is, are the costs of apportionment costs of conveyance within the meaning of the 82nd section of the Lands Clauses Consolidation Act?

The sale, including this apportionment, was carried out by agreement under the provisions of sect. 119; therefore the costs are governed by sect. 82, not by sect. 80.

It does not appear why there should be so much difference as there is in the verbiage of these sections; but still the object of the Act is clear, and that is to indemnify the landowner completely.

The agreement was entered into to obviate parliamentary opposition, and there was not time then to determine the amount of the ground-rents; but the agreement must be taken to have contemplated that this would be determined, as it provides for the payment of thirty-five years' purchase of such amount; therefore, the costs of such determination, principally surveyors' charges, are clearly included in the agreement; yet they are all disallowed, and the mere costs of the deed of apportionment allowed.

There were forty separate leasehold tenants to deal with.

The costs of preparing the schedule are properly costs of preparing the deed, which would have been useless without this schedule.

1863.
 IN RE HAMP-
 STEAD JUNC-
 TION RAILWAY,
 EX PARTE
 BUCK.

Argument.

[They referred to *Re Spooner's Estate* (a), *Lake v. Eastern Counties Railway Company* (b).]

Sir *Hugh Cairns*, Q.C., and Mr. *Speed*, contra :—

The bill of costs properly begins with the abstract.

Suppose, in an ordinary case of sale, the vendor found it necessary to have a valuation made in order to get at the proper consideration money, could it be said that the expenses of the valuation were costs of conveyance?

The state of the relations between landlord and tenant is nothing to the Railway Company, who are going to take possession of the land; this is merely a controversy to settle the amount of the consideration; if the vendor employed surveyors it was for his own benefit.

There is a good reason for the distinction between s. 80 and s. 82 of the Act:

The former section deals with persons unable or unwilling to contract, and the Legislature has said, 'if you take a man's land by force, you must pay all the costs arising out of the transaction;' but s. 82 relates to purchases by agreement, where the vendor can make his own terms, or, if he go before a jury, can urge any incidental expenses before the jury as a ground for increase of compensation; therefore the Act only provides ordinary costs in this case.

Then, as to the special agreement. The words "of and incident to the preparation of the deed" mean the ordinary professional costs of the vendor's solicitor. The costs now in question are not costs incident to the preparation of the deed, but costs of arriving at certain conclusions of fact which are to be recited in the deed.

In *Re South Wales Railway Company* (c), the costs of obtaining a conveyance from an infant were refused.

(a) 1 K. & J. 220.

(b) 19 L. T. 323.

(c) 14 Beav. 418.

Mr. *Giffard* in reply.—It cannot be meant that the things specified in s. 119 shall in all cases be done, and yet the owner shall not have the costs of doing so.

No solicitor could take upon himself to prepare such a schedule as this.

1863.
IN RE HAMP-
STEAD JUNC-
TION RAILWAY,
EX PARTE
BUCK.
—
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case turns on the difference between the expense of ascertaining the thing to be conveyed and the expense of conveyance.

Judgment.
—

I do not see in what way I can give any costs under s. 82, which are not costs of or incidental to the conveyance. But the conveyance is a perfectly distinct thing from that which is to be conveyed, and from preliminary negotiations. The conveyance begins when you have ascertained what is to be conveyed, and then the provision of the Act is, that the Company are to pay the costs of verifying the title and the expenses of conveyance.

Suppose, for instance, it had been necessary to make a map of this land for the purpose of annexing it to the deed, that would have been an expense of conveyance. So in the case of a schedule, the preparation of a draft schedule is a proper expense of conveyance, and so also is the necessary expense of ascertaining that such draft is correct. For example, if the solicitor who prepared this deed had requested the surveyor to look over the schedule and see that it properly represented the apportionment, I should have considered the surveyor's charges for so doing properly included in the expenses of conveyance.

As regards the Act, I think Mr. *Speed's* explanation the right one. Section 82 deals simply with the legal ex-

1863.

IN RE HAMP-
STEAD JUNC-
TION RAILWAY,
EX PARTE
BUCK.

Judgment.

penses of making title and conveying the property, taking these expenses in their largest sense, but not with any costs of ascertaining what that is which is to be put into the document.

If the parties cannot agree, they go before a jury, and the vendor can make any use he pleases of any such expenses as these for the purpose of inducing the jury to give him a larger sum as compensation. In that way this gentleman might have had all these expenses. Section 80, on the other hand, does not apply except where there is inability to convey, or the Company are compelling an unwilling owner to part with his land; and then, of course, the parties can do nothing by agreement, and the Company must be the sole actors and pay all expenses.

Whether the Taxing Master has or not disallowed anything which is covered by this judgment, I do not know: if the surveyor has been allowed for looking over the deed and seeing that the schedule was correct, that would be right, but I cannot allow anything more than this. If the parties think it worth while, I will refer the matter back to the Taxing Master with this expression of opinion; but it is for them to consider whether the best plan would not be to let the matter rest where it is.

It was ultimately arranged that there should be no order on the motion for costs or otherwise.

1862.

Post-582

THORNTON v. M'KEWAN.

Nov. 11th.

THIS was the Hearing of a cause instituted under the following circumstances:—

The Defendant was one of the registered public officers of the *London and County Joint Stock Banking Company*, and was sued on behalf of the Company.

In the month of July, 1856, the Plaintiff gave to the Defendant, on behalf of the Company, the following letter of guarantee:—

“*London, July 23rd, 1856.*

“To the *London and County Bank.*

“In consideration of your advancing to Mr. *Edmund Smith* the sum of £5000, from time to time, as he may require, I hereby guarantee and hold you harmless from any loss that may arise to you in consequence of such advances; and this shall be to you a continuing guarantee to the extent of £5000.

“JAMES THORNTON.”

At this time *Smith* was indebted to the Bank in a sum exceeding £18,000, and this fact was known to the Plaintiff.

Smith died in the course of the year 1857, and his estate was the subject of a creditors' suit of *Gray v. Smith*. Under the decree in that suit, the Bank were admitted to prove as creditors for the sum of £50,645 : 0 : 5, upon which they received dividends at the rate of 8s. 9d. in the £1, amounting in all to the sum of £22,157 : 3 : 11, leaving a balance of £28,487 : 16 : 6 due to them.

the fact that he might have pleaded a set-off to that extent in the action, and omitted to do so.

Such a claim is not a “mere money demand” within the meaning of the principle which excludes suits for damages merely.

*Guarantee—
Right to Divi-
dends—Set-off
—Equitable
Defence, which
might have been
taken at Law—
Mere Money
Demand.*

Where a limited guaranty has been given, and the limit has been exceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guaranty.

Where, in such a case, the guarantee has recovered the whole sum guaranteed in an action against the guarantor, the right of the latter to file a Bill for an account and payment to him of such dividends, is not barred by

1862.

THORNTON
v.
M'KEWAN.

Statement.

It was admitted that £50,645 : 0 : 5 represented the whole of the debt due from *Smith* to the Bank, guarantied and unguarantied.

In the month of June, 1861, the Defendant, on behalf of the Bank, commenced an action against the Plaintiff, on his guaranty, and recovered £5000 and costs, which was duly paid.

The Plaintiff stated that he did not then know that any dividend had been received from *Smith's* estate.

In the month of December, 1861, the Plaintiff's solicitor wrote to the solicitors of the Bank, claiming the dividends paid and to be paid in respect of £5000, part of their debt of £50,000, as having, under the circumstances, become due to him.

To this the solicitors of the Bank returned the following reply:—

“Dear Sir,—Your client guarantied the *London and County Bank* against loss in respect of advances to *Edmund Smith*, to the extent of £5000. After giving credit for the dividends received upon their debt, the Bank are still creditors for much more than £5000. We are at a loss to apprehend the ground of your client's claim, and will appear for the Bank to any process which you may think fit to issue.

“Your obedient servants,
“WILKINSON, STEVENS & WILKINSON.”

This Bill was then filed.

The Defendant filed a voluntary answer, submitting—

1. That the guaranty was originally meant to cover, and did cover, all losses of the Bank in respect of *Smith's* account, subject only to the limitation that not more than £5000 was to be recovered upon it.

2. That the Plaintiff, if he ever had any such right as that claimed, had lost his remedy by delay; and,

3. That such right, if it existed, might have been enforced by a plea of set-off in the action; and that, not having been so enforced, this Court would not now interfere.

1862.
THORNTON
v.
M'KEWAN.
Statement.

Mr. *Giffard*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

Argument.

'The fact that the defence was not taken in the action does not prevent us from taking it here: *Davies v. Stainbank* (a).

The substantial point at issue is this: This is not a guaranty against all advances, but is limited specially to £5000; and we say, therefore, 'whatever dividend the Bank have received on their whole debt, we are entitled to receive back from them on the £5000 which they have recovered from us in the action:' the Bank, on the other hand, say 'you are a surety for all advances, merely limited in this way, that not more than £5000 is to be recovered from you on the guaranty.' Our view is, however, the one sanctioned by authority in Bankruptcy, *Ex parte Rushforth* (b), *Ex parte Holmes* (c), *Ex parte Hope* (d):

In this Court, *Paley v. Field* (e):

And in Courts of Law, *Bardwell v. Lydall* (f), *Raikes v. Todd* (g):

And in *Ex parte Hope* the manner of avoiding this conclusion is shewn, but it has not been adopted in this case. At any rate we have a right to secure future dividends.

(a) 6 D. M. G. 679.

(d) 3 M. D. & De G. 720.

(b) 10 Ves. 409.

(e) 12 Ves. 435.

(c) M. & Chit. 301.

(f) 7 Bing. 489.

(g) 8 Ad. & E. 846.

1862.
 THORNTON
 v.
 M'KEWAN.
 Argument.

Sir *Hugh Cairns*, Q.C., and Mr. *Henry Stevens* (Mr. *Roll*, Q.C., with them), for the Defendant:—

The construction of the guaranty is not a question for this Court. The Plaintiff ought to have set up this claim as a set-off in the action. It is true, he says he did not know we had received this dividend, and it is possible that he had not clear notice that we had actually received the money; but it abundantly appears that he knew that such dividends had been declared, for he does not dispute that he himself was a large creditor of *Smith*, and that he has proved his debt in the very same suit of *Gray v. Smith*, or that he has received dividends on that debt to the amount of 8s. 9d. in the £1.

In *Davies v. Stainbank* the Plaintiff was entitled to file a Bill *ab ante*.

In *Paley v. Field* the surety had paid the debt, and it was necessary for him to file a Bill, in order to impress a trust upon the dividends in the hands of persons who had proved, because, according to the then existing Bankrupt Law, the holders of the dividends had a legal Parliamentary title. In this case, if the Plaintiff has any right whatever, it is to a demand for money had and received, which is not ground for supporting a Bill.

[They referred to *Harrison v. Nettleship* (a).]

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

On the question whether the Plaintiff is or not entitled to the dividends he claims, I cannot entertain any doubt. On the authorities, the construction of this guaranty is

(a) 2 M. & K. 423.

clear, and I must hold that the dividends must be applied in reduction of the £5000 which the Plaintiff would otherwise be liable to pay to the Bank. It is not necessary now to repeat that a surety is entitled to the benefit of all that the principal creditor can recover without resorting to the surety. The question can only arise on a case of this description, where there is a large general debt, part only of which is secured, and the creditor has received a sum generally in part payment of the debt, which still leaves more than the secured amount due; then a question may arise whether the creditor is entitled to the benefit of the whole guaranty, or whether he must give credit for a proportional part of what he has received. This point has been more than once before the Courts, and has been decided against the creditor; and I cannot hold that there is any thing sufficiently special in the form of this guaranty to take it out of the general rule.

The only question, therefore, that remains is, whether or not the Plaintiff is precluded from filing a Bill. The Defendant says he ought to have availed himself of this defence at law; but if he has an original right to relief in this Court, I do not think that that right is affected by his omitting or declining to submit the same to the decision of a Court of Law. I take the rule to be, that, if you have a substantial equity, you may come here, whether you have or not had an opportunity of pleading the same matter at law (a). Then has this Plaintiff any equity sufficient to support this Bill. Any person who has paid a debt for another has a right to come here and claim to stand in the place of the original creditor against the estate of the principal debtor; and if the principal creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, and to have all future dividends se-

1862.
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 M'KEWAN.
 Judgment.

(a) See *Evans v. Bremridge*, 2 K. & J. 174, affirmed by the Lords Justices, 8 D. M. G. 100.

1862.
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M'KEWAN.
Judgment.

cured for him in this Court, and I think that he is entitled to file a Bill at once if there be any future dividends anticipated, so as to enable him to stand in the place of the creditor against the estate of the deceased debtor in respect of such dividends: but if he has such an independent right, it seems to follow that he is not precluded from enforcing it merely because he did not choose to plead a set off; of course, if there has been *negligence*, that would deprive him of his equity: that is the case of *Harrison v. Nettleship*; but I cannot hold that there has been any negligence in a case of this sort. I do not think it would have affected this question, even if the Plaintiff had known that the Bank had received these dividends; it was for them to inform him of the fact, and to offer to carry the amount to his credit; but I am not satisfied that such knowledge is in fact brought home to him. I give full credit to his statement, that he did not know that these dividends had been received. The case stands thus:—

A letter is written to him, in which he is told that more than £5000 will remain due after the receipt by the Bank of everything that can be recovered from the estate; but I cannot hold from that that he must necessarily have supposed that the Bank were going to prove for that £5000; he might very well have imagined that the Bank would receive his £5000, and would prove merely for the balance of their debt (as he was told that in any case more than £5000 would be due), and I do not think that there was anything necessarily to lead him to the belief that the proof would be made for the whole.

Besides, when the estate has not yet been finally wound up, I think this Court the more convenient forum; because a proof against the deceased's estate would continue operative until the estate was exhausted, and the Plaintiff might therefore well determine to file a Bill at once and once for all,

instead of resorting from time to time, as dividends were received, to proceedings at law. There must be a decree that the Plaintiff is entitled to stand in the place of the Bank in regard to all dividends received or to be received in respect of the £5000, part of the larger sum for which the Bank have proved; and the Plaintiff must have interest on so much as has been received from the day on which demand thereof was made; and the Bank must pay the costs of this suit.

1862.
 THORNTON
 v.
 M'KEWAN.
 Judgment.

Some discussion ensued as to the rate of interest to be charged—and the VICE-CHANCELLOR held, that, if interest had been recovered in the action at law, the Defendant should pay interest at £5 per cent.; but it appearing that the £5000 had been recovered without interest, the decree was made for interest at £4 per cent.

CROSSMAN v. THE BRISTOL AND SOUTH WALES UNION RAILWAY COMPANY.

1863.
 July 23rd.

Jurisdiction—
 Commissioners
 of Sewers—
 23 Hen. 8, c. 5
 —3 & 4 Will. 4,
 c. 22.

THIS was a motion for an injunction to restrain the Defendants "from digging up, removing, carrying away, or using, for the purposes of their undertaking or otherwise howsoever, any of the deposit of chessel or beach forming the mound or ridge known as the *Chessel Mound*, or any part of the chessel or beach on the banks of the river *Severn*, in the district known as the *Lower Level*, in the County of *Gloucester*," within the jurisdiction of the Commissioners of Sewers mentioned in the Bill.

This Court has jurisdiction to entertain a Bill at the suit of the Commissioners of Sewers appointed under 23 Hen. 8, c. 5, notwithstanding that such Commissioners are a Court of Record.

The Plaintiff was the clerk of the Commissioners of

Where a public body are intrusted

by Act of Parliament with the duty of executing certain works, this Court will not, in general, receive independent evidence to show that they are not carrying on those works in the best manner.

1863.
 CROSSMAN
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 COMPANY.
 Statement.

Sewers appointed for the district known as the "*Lower Level*" of the County of *Gloucester*.

Commissioners of Sewers are quasi-corporate bodies, appointed in pursuance of the provisions of the Act of 23 Hen. 8, c. 5, by which their rights and duties are defined. The form of their commission is prescribed in and by the said Act (a). The powers and privileges of such Commissioners were considerably altered and enlarged by Acts of Parliament, of 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 3 Jac. 1, c. 14; and 3 & 4 Will. 4, c. 22 (b). By the operation of these Acts the Commissioners are a high Court of Record, with power of making laws and constitutions, and of issuing writs on process for enforcing their own decrees; and they are empowered to take and hold land, and construct and maintain works of various kinds; and the property in the works is vested in them.

By Letters Patent, dated 19th April, 1858, a body of 178 noblemen and gentlemen were appointed such Commissioners for the district in question.

This district is of very great value and extent, and requires considerable protection from the sea, as it lies very low, and a great part thereof would (but for artificial embankments and beach mounds) be liable to be overflowed by high tides, and would also (but for a system of sluices introduced and maintained by the Commissioners and their predecessors in office) be liable to land floods, arising from the backing up of the land drainage, owing to the rush of the tide up the estuary of the *Severn*.

About eight miles from the mouth of the estuary there is an ancient ferry, called "The New Passage," and an artificial sea wall runs from this ferry southwards for about three-quarters of a mile. This sea wall is very massive and costly, and about forty years ago it was re-erected of solid

(a) ss. 2, 3, 4.

(b) ss. 10, 19, 21, 24, 47.

masonry, at a great expense, and its base guarded by artificial rocks placed at its foot, so as to secure the nucleus of a deposit of shingle and beach. From the said ferry northwards the coast is protected by an artificial bank of earth, which is itself protected by a natural mound of shingle, known as the *Chessel Mound*.

1868.
CROSEMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.
—
Statement.

Close to the said ferry a large tidal sluice under the management of the Commissioners, called the *Chessel Pill Sluice*, runs into the *Severn*, and part of the operation of the *Chessel Mound* is to protect the outlet of this sluice from the action of the sea. One of the ordinances made by the Commissioners under their statutory powers was in the following terms: "That no person or persons shall remove any of the chessel or beach between the sea wall and the low-water mark of the river *Severn*; or damage, deface, or remove any bridges, gouts, gates, posts, or rails, or any notice board erected or placed up by order of the Commissioners of Sewers in any part of the level, or any of the boundary stones or landmarks placed on the sea wall or on any run or sewer to distinguish the shares of the different persons liable to repair or cleanse the same wall, run, or sewer; or wilfully or clandestinely remove any stones, balk, or other thing placed in front of the sea wall, for the preservation thereof; under a penalty not exceeding £5 above the value of the property removed or damaged, according to the nature and degree of the offence, and as the Commissioners, before whom any complaint shall be made, shall in their discretion think fit."

This ordinance is still in force.

In the year 1847 Mr. *Lewis*, of *St. Pietre*, the then proprietor of the soil of the *Chessel Mound*, and lord of the manor wherein the same is situate, conveyed certain lands (including the *Chessel Mound*) to the *Bristol and South Wales Junction Railway Company*.

1863.
 CROSSMAN
 v.
 THE BRISTOL
 AND SOUTH
 WALES UNION
 RAILWAY
 COMPANY.
 Statement.

A small portion of this land (including part of the bank of *Chessel Pill*, but no part of the *Chessel Mound*, was sold by this Company to the Commissioners.

This Company was afterwards dissolved, and the greater portion of the said lands (including the mound) was conveyed by them to the Defendants, who claimed, by virtue of these conveyances, to be the owners of the *Chessel Mound*.

In the month of May, 1863, the Defendants, under such claim of ownership, removed a portion of the gravel or shingle of the mound, for the purposes of their line, and thereupon the following letter was written to their contractor by the Plaintiff's firm :

"*Thornbury*, 5th May, 1863.

"Sir,—It having been reported to the Court of Sewers that a considerable quantity of chessel or beach between the sea wall and the low-water mark of the *Severn* has been removed by you, and used in the construction of the pier of the *Bristol and South Wales Union Railway*, we beg to inform you, by direction of the Court, that your so doing is a violation of their laws and ordinances, by which you have incurred a penalty of £5, and that in case of its recurrence after this notice the penalty will be inflicted.

"We are, Sir, your obedient servants,

"CROSSMAN & LLOYD."

The Defendants thereupon, on the 22nd June, 1863, applied, by their engineer, for permission to take gravel from the mound for certain limited specified purposes connected with their undertaking. This permission was refused, and the Plaintiff personally informed the solicitors of the Defendants that the ground of refusal was that the Commissioners apprehended danger to the sea wall and

embankment if the *Chessel Mound* was removed or materially interfered with.

Notwithstanding this refusal, the Defendants, as such owners as aforesaid, took measures for the purpose of removing some of the shingle from the mound, and applying the same to the purposes of their undertaking. Thereupon this Bill was filed.

The Commissioners, besides proving the facts above stated, brought forward witnesses to prove that they had exercised jurisdiction in respect of this mound, by refusing leave to persons who applied to them for permission to take away shingle therefrom, and punishing those who did so; and particularly that on the 19th of August, 1823, a fine of £1 : 7 : 6 was imposed upon *James Lowdon Macadam Esq.* and *Mr. George Downs*, the Surveyor and Deputy Surveyor of the *Bristol Turnpike Roads*, for removing gravel from the *Chessel Mound* for the purposes of such roads; and that at a subsequent Court the fine was, on their undertaking not to do the same thing again, remitted.

The Defendants, on the other hand, brought witnesses to show that, at least since the year 1784 and for many years after 1811, the contractors for the roads and others (and particularly *Mr. Lewis*, the then owner,) used to draw gravel and shingle from the mound without any attempt on the part of the Commissioners to prevent them from doing so; and that, notwithstanding such constant drain, the mound had rather increased than decreased.

There was the usual conflict of engineering evidence as to the probable result of any great diminution of the mound; and as to whether the works of the Defendants, if carried out, would or not be likely to produce any such diminution.

1863.
CROSSMAN
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1863.

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THE BRISTOL
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WALES UNION
RAILWAY
COMPANY.—
Argument.

Mr. Rolt, Q.C., Mr. Giffard, Q.C., and Mr. Fox Bristowe
in support of the motion:—

This *Chessel Bank* is a natural "defence by the coasts of the sea," and therefore within the express terms of our commission. Whatever our rights of suit may have been when the case of *The Duke of Newcastle v. Clark (a)* was decided, there can be no doubt that we now have power to sue (b), and we have exercised it. The property in all lands, &c., within our view, cognizance, or management, is vested in us by statute (c); and our rights are expressly reserved by the *Bristol and South Wales Union Railway Act (d)*.

We are not acting from caprice, but from a bonâ fide purpose of protecting our works.

There are at present 109 actions pending against us in consequence of floods.

We are trustees for the public with a wide jurisdiction, and have duties to perform irrespective of any question of property.

Then it is said, we accepted a conveyance from the Defendants, and so acknowledged their right. But that conveyance had no reference to the *Chessel Mound*. True, the conveyance to the Defendants may have included the mound, but their vendor could only sell subject to our rights.

It is said that large quantities of this gravel have been from time immemorial taken without our permission; but there is no analogy between the wholesale removal of the shingle for the purposes of a railway and the occasional carting away of a few loads at a time. Besides, the evidence shows that we interfered to prevent even that.

[They also referred to *Newton v. Cubitt (e)*].

(a) 8 Taunt. 602.

(d) 20 & 21 Vict. c. liv. s. 32.

(b) 3 & 4 Will 4, c. 22, s. 57.

(e) 12 C. B., N. S., 32.

(c) Id. s. 47.

Mr. James, Q.C., and Mr. *Lorence Bird*, contra:—

The Plaintiffs have no right of property either in the bank or in the sluice.

The VICE-CHANCELLOR.—The Act (a) vests in the Commissioners all lands, &c., under their view, cognizance, or management.

Mr. *James*.—That refers to artificial works. This is a natural defence merely, and they can have no right in it, unless they have either the property or an easement.

Besides, the mound is due to the action of the river, not of the sea, and therefore is not in any manner within the purview of their appointment.

To issue this injunction would be to confiscate our property to the extent of thousands of pounds.

The Act only vests in the Commissioners what they have themselves created, and cannot be supposed to divest the property of all the landowners on the coast.

Besides, these Commissioners are a Court of Record, and should enforce their own decrees by their own process: *Inhabitants of Oldbery v. Stafford* (b). And this Court ought not to interfere: *Kerrison v. Sparrow* (c).

The VICE-CHANCELLOR.—Was not the object of the later Act to enable them to bring trespass, notwithstanding their being this High Court?

Mr. *Bird*.—They had no property; therefore they could not bring trespass; then the Act vested in them a property, not *the* estate, for the mere purpose of enabling them to bring trespass or prefer an indictment.

We are ready and willing to pay the £5, at which they have themselves assessed the penalty.

(a) 3 & 4 Will. 4, c. 22, s. 47. (b) Sid. 145. (c) 19 Ves. 449.

1863.
CROSSMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.
Argument.

1873.

CROSSMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.

Argument.

If there be any right whatever on the part of the Plaintiff to come here, the proper remedy is by information.

There is no sufficient evidence that what we are about to do will be productive of mischief: *Earl of Ripon v. Hobart (a)*, *Haines v. Taylor (b)*. The effect of our works has been to increase not diminish the whole quantity of shingle.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think there ought to be an injunction in this case.

I do not think there is any possibility of doubt on which side the balance of convenience lies. Mr. *James* speaks of confiscation; but supposing it to turn out that the Commissioners are right, it would be really confiscation not merely of their property but of all that valuable district of which they are the authorised protectors, to refuse to interfere on their behalf. On the other hand, the damage to the Company, supposing them to be in the right, will be a mere question of expense. It simply comes to this, that if they cannot take the gravel from the bank, they must go further for their materials.

But if this be so, surely the bank must be maintained in statu quo till the Hearing. It has stood so for centuries, and I am not satisfied that it could possibly be replaced were I to allow it to be removed.

These considerations narrow the question to this: "Is there a bonâ fide case on the part of the Plaintiff? Have the Commissioners reasonable and probable cause for saying that they are right in their contention?" If that be so, I must, on the grounds I have just stated, interfere by injunction.

(a) 3 My. & K. 169.

(b) 2 Ph. 209.

To determine this question, it is necessary to consider :—

1. What were the powers and duties of the Commissioners before the passing of the Act of William 4 ?
2. How were these powers affected by that Act ?

The commission under which these gentlemen, and I believe all other Commissioners of Sewers in *England*, act, is contained in the statute of Henry 8.

[His Honour read the preamble to the commission from the Act, s. 2.]

The damage against which the Act was directed was, that the defences on the coasts were “disrupt, lacerated, and broken,” and then by the next section Commissioners were appointed to remedy this evil: and they are to “survey the said walls, streams, &c., and the same cause to be made, repaired, &c.” (the expression “to survey” explains what is meant by the words “within their view” occurring in the later Act,) and thus armed, the Commissioners were constituted a Court of Record to carry out the purposes of the Act.

That is the form of the Commission.

Then what happened in *The Duke of Newcastle's case* (a) was this: the Commissioners having erected certain banks which had been interfered with by the Defendant, brought an action for the trespass: the Court were unanimously of opinion that the Defendant was a wrongdoer, but they thought that the Commissioners had no such property in the bank as could enable them to maintain an action, and they give as a reason for holding that there was no such property in the Commissioners, that they stood in a much higher position, and were a Court of High Jurisdiction, not entitled to sue, nor subject to be sued.

If, therefore, the case now depended on the effect of the

(a) *Ubi sup.*

1863.
CROSBYMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.
Judgment.

1863.
 CROSSMAN
 v.
 THE BRISTOL
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 RAILWAY
 COMPANY.
 Judgment.

commission, unassisted by subsequent legislative authority, I should be of opinion that the Plaintiff had no right to come here, and should feel compelled to refuse this motion.

But then the Act of William 4th is obviously meant to obviate this very difficulty; and this Act seems to me to supply a sufficient answer to Mr. *Bird's* argument, that the Plaintiff is not in a position to sue in this Court.

The Act (a) vests in the Commissioners "all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been and shall hereafter be purchased, obtained, erected, constructed, and made by or by the order of, or *which shall be within or under the view, cognizance, or management*" (very large words) "of any Commissioners of Sewers," not noticing artificial works specifically, but using words quite large enough to cover all works natural or artificial over which the Commissioners had any jurisdiction.

It appears from a passage in *Callis on Sewers* that there was some doubt at one time whether these words extended to rivers, but Lord *Cottenham* determined that the jurisdiction does so extend, at least in the case of navigable rivers.

Then the latter part of this section provides a remedy. [His Honour read it.]

I must not cut down the effect of this by reading "or" as "and," as Mr. *James* suggests that I should do: it may indeed be that Mr. *Bird's* construction of this clause is right, but that I will not now determine.

What was intended to be remedied? It was found that the Commissioners could not bring actions, and the Legislature thought that they ought to have this power.

Mr. *James* compares this Bill to a suit by the Court of *Queen's Bench*; it seems to me much more analogous to a

(a) s. 47.

suit by a lord of a manor against one of his copyholders; but I have really nothing to do with that at present—the Legislature has expressly empowered the Commissioners to bring actions and prefer indictments without the intervention of the *Attorney-General*.

1863.
CROSSMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.
—
Judgment.

It is their duty to undertake the protection of the interests intrusted to them by action, indictment, or the like if thereby they can do so more effectually. Now, suppose *Mr. Bird's* contention to be right, and that it was not intended to give them power to sue in this Court, still, as it admittedly vest in them a special property for the purpose of enabling them to maintain actions and prefer indictments, this Court would interfere by interlocutory injunction to prevent any injury to their property pending such actions or indictments. But when I look at section 57, I find that that section expressly refers to suits in equity in respect of property "vested in them as aforesaid."

Then, what I now have to determine is reduced to this:—Is there or is there not a question to be tried at the Hearing? that is, can I say to a certainty that this *Chessel Bank* has never been under the view of the Commissioners? Now, what have they in fact done? For forty years at least they have exercised jurisdiction over this bank: and I have it in evidence, that in the year 1823 a person named *Macadam* was fined for taking gravel from this bank; it is not clear whether he was the great contractor or not, but at any rate he was not a mere labouring man who might not have had the means of resisting an usurpation, but a man who was making a road in the neighbourhood, and who must therefore have been able to appeal against and prevent any attempted excess of jurisdiction on their part.

Then I have the evidence of the clerk to the Commissioners, who deposes to several cases in which persons have asked their permission to draw shingle from this bank, and

1863.
CROSSMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.

Judgment.

have been refused ; and it appears that the Defendants themselves actually asked for such permission, and only proceeded to take the law into their own hands after they had failed in persuading the Commissioners to grant it.

It is not possible to contend that the bank has no operation in preventing the water from approaching the land, so as to raise the case, that all this action on their part was an obvious usurpation ; and then, once granting it as plain that the bank *may have been* properly considered within their jurisdiction, this exercise of right by them becomes important to show that it probably was so.

Does the conveyance by the lord of the manor alter the position of the parties in this respect? I think it probable that that might have been so but for the Act of William IV. I can easily understand that conveyances may have been made on such a title as this ; but that would not interfere with the rights of the Commissioners of Sewers.

Then it is said, the Commissioners have bought from the predecessors in title of the Defendants lands which are included in the same conveyance as that which granted this bank ; but that is not sufficient to work an estoppel with regard to the bank.

I cannot regard the engineering evidence offered ; even on the supposition that any one could foretell what would be the course of a navigable river when natural obstacles have been removed, I should still feel bound to follow the analogy of the cases respecting railways, in which the Court always gives implicit credence to the persons to whom the Legislature has entrusted the carriage of the works, and therefore I cannot interfere with the manner in which these Commissioners may think fit to conduct their works.

If the Commissioners have the right to this bank I

shall pay no attention to any evidence of any engineers in the world.

Continue the injunction till the Hearing, with an undertaking as to damages.

1863.
CROSSMAN
v.
THE BRISTOL
AND SOUTH
WALES UNION
RAILWAY
COMPANY.
Judgment.

SWEETMAN v. METROPOLITAN RAILWAY COMPANY.

THIS was a motion for injunction.

It appeared that the Plaintiff was in occupation of certain premises in the *City of London*, which were required by the *Metropolitan Railway Company* for the purposes of their Act. The Plaintiff had no legal lease of these premises, but held under a written agreement for a term which would expire in the year 1870. In June, 1863, the Company served him with the usual notice to treat, and in his claim, which was duly made in answer to such notice, he calculated his interest as though he held the premises under a lease for that term; whereupon the Company, on the 30th November, 1863, required him to produce his lease or grant; and upon his producing the agreement in question, they elected to treat him as a yearly tenant only, and accordingly, under the provisions of the *Lands Clauses Consolidation Act (a)*, they summoned him before the sitting Alderman, who agreed with them in the opinion that he could not regard any equities affecting the property, and he assessed the value of the Plaintiff's legal interest at £300. The Company had offered the Plaintiff £600 for his interest, which he had refused: they had thereupon taken possession of the premises, and intended immediately to pull down the buildings and sell the materials.

1864.
Jan. 13th.
Lands Clauses Act, ss. 121, 122
—*Equitable Lessee.*
A written agreement void at law, but equivalent in equity to a lease, is an interest greater than a yearly tenancy, within the meaning of the *Lands Clauses Consolidation Act*; and a tenant having and producing such an agreement is not liable to have the value of his interest assessed by two justices under the 121st section of the Act.

This Bill was then filed, for the purpose of restraining them from dealing with the property until the value of

(a) s. 121.

1864.
 SWEETMAN
 v.
 METROPOLITAN RAIL-
 WAY COMPANY.

Argument.

the Plaintiff's interest had been ascertained under their ordinary compulsory powers, or the Company had obtained the certificate of two surveyors, and given a bond in the manner required by the Act (a).

Mr. *E. K. Karlake*, for the motion.

Sir *Hugh Cairns*, Q.C., and Mr. *Bovill*, contra:—

The Act provides (b) that any person who claims under a lease must produce it to the Company; and thereupon they are to deal with him as having a right greater than a yearly tenancy, that is, under the more elaborate proceedings directed by the earlier sections (c); but if he do not produce or give other "best evidence" of a lease, he is to be dealt with under section 121, and to have his interest assessed by two justices.

The VICE-CHANCELLOR.—Suppose he had a written agreement for 999 years?

Sir *Hugh Cairns*.—That is an extreme case in one direction; suppose, on the other hand, a mere assertion of a particular lease for seven years, denied by the landlord: are the Company to try the question as between landlord and tenant?

The Legislature says, "have you a lease or grant?" It does not put the Company to deal with the equities, if any, of the tenant; he and the landowner must deal with those equities as they please inter se.

The document in this case is admittedly void at law (d), and all that we have to do is to get in the legal interests. The less we pay the tenant the more we have to pay the landlord, and the Plaintiff, if he have any rights in equity, can recover his due proportion of the latter sum.

A reply was not heard.

(a) s. 85.

(b) s. 122.

(c) ss. 18 — 68, 85.

(d) See 8 & 9 Vict. c. 106, s. 3.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The frame of the Act of Parliament is, that no possession is to be taken by the Company until they have satisfied certain preliminary conditions; if the occupying tenant have any interest greater than a yearly tenancy he must be dealt with as an owner; and if the Company wish to take possession, before they have agreed with him, they must do so under the power of the 85th section, and give him the bond and the security of the payment into court thereby directed; but if he have no estate greater than a tenancy from year to year, they are at liberty to bring him before two magistrates (a) and have the value of his interest summarily assessed.

Then the Act (b) provides, that if any lessee obstructively refuses to produce his lease or grant, he may be treated as a tenant from year to year; and the Company are in this case endeavouring to apply this provision to the totally different case when a gentleman produces a written agreement, which, though equivalent in equity to a valuable lease, is void at law under the provisions of the late Real Property Act (c), on the ground that, as the gentleman in question has admittedly no legal right greater than a tenancy from year to year, he cannot produce any grant or lease within the meaning of the section. I do not concur in this contention. Either the meaning of the section is, that if the occupier produces an equitable lease he is not to be considered as a yearly tenant, or else such a case as this is not contemplated by the section at all, and must therefore be dealt with according to the general provisions of the Act.

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LITAN RAIL-
WAY COMPANY.

Judgment.

Injunction according to notice of motion.

- (a) Or one in the Metropolis. (b) s. 122.
See 2 & 3 Vict. c. 71, s. 14. (c) 8 & 9 Vict. c. 106.

1863.

Nov. 21st &
23rd.*Will—Residue
—Revoked
Gift.*

Where by the will the residue is given in shares, and by a codicil the gift of one of those shares is directed on a certain contingency to sink into the residue, "and be held and applied accordingly," the heir and next of kin of the testator will, upon the happening of the contingency, be respectively entitled to the said share, to the exclusion of the residuary legatees.

LIGHTFOOT v. BURSTALL.

FRANCIS HALL, by his will, dated the 9th March, 1843, after certain specific legacies gave all his real and personal estate to the Plaintiffs upon trust for sale and conversion into money as one entire fund. And after several specific directions there was a residuary bequest as to two-thirds upon trust for the Defendants *Bolton* and *Locke*, and as to one-third upon trust for *Francis Burstall* for life, with remainder to his children in manner therein mentioned. The will then proceeded as follows:—

"If there shall be no such child, then after the decease of the said *Francis Burstall*, and such failure of his issue as aforesaid, the same trust moneys and premises shall sink into and form part of my residuary real and personal estates, and be held and applied accordingly."

At the death of the testator, part of his residuary estate consisted of a debt of £1000, due to him from a person of the name of *Hassel*. This £1000 was, on the distribution of the trust fund in 1856, accepted by the Defendant *Locke* as part of his one-third of the residue.

In 1857 *Hassel* became bankrupt, and *Locke* received a dividend on the debt; and by a release, dated 26th July, 1859, *Locke* released the trustees of the will of and from all the real estate and residuary personal estate of the testator, "save and excepted to the said *T. B. Locke*, all such right, title, claim, or interest, as he then had, or might thereafter acquire or become in anywise entitled to, under or by virtue of the will of the testator or otherwise, in or to the shares or proportions retained for the benefit of the said *F. Burstall* and *M. Bolton* and their children respectively, or any or either of them."

Francis Burstall died on the 12th of March, 1861, without issue.

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LIGHTFOOT
v.
BURSTALL.
Statement.

The Bill was filed by the executors of *Francis Hall* to obtain a declaration from the Court as to who were entitled, and in what proportions and in what manner, to the one-third share in which *F. Burstall* had had a life interest.

Mr. *Rendall* for the Plaintiffs:—

Argument.

There are three questions on which the direction of the Court is desired:—

1. Whether the capital of the one-third share of residue given to *Burstall* for life is or not disposed of?
2. Whether, if undisposed of, it all goes to the next of kin, by reason of the conversion directed by the will; and if not, whether the heir-at-law takes the part which represents the real estate as realty or personalty?
3. Whether the Defendant *Locke* is entitled to be recouped out of this share, if undisposed of, for his loss in respect of the £1000 debt?

Mr. *Rolt*, Q.C., and Mr. *Wickens* for the next of kin of the testator submitted that the second point was clear.

The heir and next of kin took, if at all, in the proportions in which the real and personal estate had contributed to the fund; and the heir took his part as personalty.

On the first point they contended that there was an intestacy.

It is not to be supposed that the testator intended the gift which had failed to become part of another gift, which would therefore also partially fail, and so toties quoties.

The point is concluded by authority; *Humble v. Shore* (a).

(a) 7 Hare, 247.

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 v.
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 Argument.

Mr. *Nalder* for the heir-at-law, and Mr. *Jackson* for the assignees of one of the next of kin who had become bankrupt, supported this contention.

Mr. *Amphlett*, Q.C., and Mr. *Fox Bristowe* for the residuary legatees :—

The intention of the testator is, that this share should fall into the residue; the question then is, who is entitled to the residue? We are entitled to one-third each of it, and then the remaining one-third is again to fall into residue, and be again similarly subdivided, and so on ad infinitum; therefore we are entitled at once to take it all : *Atkinson v. Jones* (a).

In the gift to *Bolton*, which is in other respects similar to that to *Burstall*, there is no gift over, which is important to show that the testator intended something different from an intestacy in this case.

The VICE-CHANCELLOR.—A reference to the cases cited in *Humble v. Shore* shows that that case was very fully argued.

Mr. *Bristowe*.—That case is, no doubt, an authority against us; but the cases of *Evans v. Field* (b), and *Harris v. Davis* (c), which were there cited, are equally strong authorities the other way.

We are not in possession of the reasoning on which the Vice-Chancellor founded his judgment in *Humble v. Shore*; and the expressions of one testator are no sufficient guide to the intentions of another.

The intention was, that we should take everything which was to be had consistently with the possibility that *Burstall* might have children.

Mr. *Rolt* in reply read extracts from the shorthand writer's note of the judgment in *Humble v. Shore* (d).

(a) Joh. 246.

(c) 1 Col. 416 : see p. 426.

(b) 8 L. J. N. S. Ch. 264.

(d) See infra, p. 550.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Irrespective of the decision in *Humble v. Shore*, it seems to me right on principle to hold that this one-third share is undisposed of.

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BURSTALL.
Judgment.

The fallacy of Mr. *Amphlett's* argument, ingenious as it was, consists in this assumption, that a direction that the share should sink into residue amounts to a gift of that share. Now, whatever suspicion we may have in such a case that the testator was misled by the supposed analogy of gifts of legacies, which, when directed to sink into the residue, do go to the residuary legatees, and whatever inclination there may be to hold that words of this nature must mean something more than the law would imply and are not mere surplusage; it is impossible, on the other hand, to overlook the obvious fact, that if the testator's desire was that this share should go over in this manner, it would have been as easy to say "shall go and belong to my other residuary legatees," as to employ the words actually used in this case. The distinction between this case and *Evans v. Field*, which was itself a strong decision, is this:—In that case the testatrix expressly disposed of what should fall in by failure of her prior bequest, and therefore plainly contemplated that a portion of the residuary gift itself might fail, which she thereupon gave over again in like manner; and then the Vice-Chancellor, apparently on a similar principle to that of *Atkinson v. Jones*, considered that that carried the whole to the remaining residuary legatees: it would be going too far to imply such an intention as this merely from a direction to do that which the law would have done without direction.

I admit that you cannot often look usefully at the construction of one will to enable you to interpret another will; but when the wording is precisely similar, as in this case, I do not see that the authority of a prior decision is less binding in this case than in any other.

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 LIGHTFOOT
 v.
 BURSTALL.
 Judgment.

It seems to me clearly that I cannot decide this case in favour of the residuary legatees without overruling the opinions of Vice-Chancellor *Wigram* (a) and Lord *Cottenham*.

(a) HUMBLE v. SHORE.

The facts of this case are sufficiently stated in Mr. *Hare's* Reports; but the effect only of the decision is there given. The following report of the judgment is taken from the short-hand writer's notes:—

1847.
 March 13th.

VICE-CHANCELLOR SIR JAMES WIGRAM:—

I will dispose of the question about the next of kin, the only point about which I feel any difficulty, on Tuesday morning. In the meantime I will state the point on which I think my judgment must eventually turn.

By the will, one-sixth of the residue is given to *Sarah Whitaker* absolutely. By the codicil the testatrix recites that she had by her will or testamentary appointment given and bequeathed one-sixth of the moneys constituting the residuary fund arising from her real and personal estate unto or in trust for her cousin, *Sarah Whitaker*, absolutely. And then she goes on in the following words:—

"And whereas it is my will and meaning that the said *Sarah Whitaker* shall take and enjoy only a life-interest in the aforesaid part or share of the said residuary trust fund, and, subject thereto, that the capital of the same fund shall be disposed of as hereinafter mentioned: Now, therefore, I direct." She then gives a direction, which I omit because it is inapplicable to the ultimate disposition of the fund. She then goes on to say what the disposition of the capital shall be, and importing that into the clause I first read, the case will be the same as if she had said "I give her only a life-interest in the aforesaid residuary trust fund; and subject thereto the capital of the same shall sink into the residue of my personal estate, and be disposed of accordingly." Now, if she had simply said, "I will that she shall take a life-interest only," that would be equivalent to a revocation of the bequest to her, except to the extent of the life-interest, and in that case *Creswell v. Cheslyn** would have been a direct authority for the proposition that the next of kin would be entitled to the property. The effect would have been, that in law the share, subject to her life-interest, would have sunk into the residue, and would have been disposed of as such. If the testatrix, instead of merely revoking the bequest to her except to the extent of her life interest, goes on to say, "I will that it shall sink into the residue," she expresses no more than the law would imply, and the case would be precisely the

* 2 Eden, 123.

which I should hesitate long before doing, even if my own opinion differed from theirs, which it does not.

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LIGHTFOOT
v.
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Judgment.

same as it was before, and the estate would be distributed to the next of kin. The whole question turns on this: Besides saying "it shall sink into the residue," she gives a direction to her trustees, that it shall be disposed of accordingly; and the question is, whether, having willed it to sink into the residue, and be disposed of accordingly, those words "disposed of accordingly" mean disposed of as residue, or whether they mean something else. On that point I will look into the will to see whether from any parts of it I can collect an intention, or get any certain guide to go upon. I agree with Mr. Roll, that the words confirming the will make no difference; because, though the codicil does republish the will, it republishes it in the same words in which it was written; and it is very rarely indeed that the effect of any disposition is altered by the codicil. The way in which the republication acts, just as it did before the late Wills Act came into operation, is, that it sweeps in property which had come into distribution subsequent to the date of the earlier paper; except in that respect, it is in general a mere repetition of the words of the will, and those words ordinarily speak in the same way as if the will had remained unaltered. This is not always the case, but it is the rule.

That is really the whole question with regard to this share.

VICE-CHANCELLOR SIR JAMES WIGRAM, after restating the facts nearly in the words of his former judgment, proceeded as follows:—

March 16th.

Now, the case of *Creswell v. Cheslyn* is a direct authority that where an absolute gift of a share of residue is afterward revoked, that share becomes residue undisposed of, unless it is given to some one else.

The question, therefore is, on the codicil, whether there is a gift of *Sarah Whitaker's* share to any one else. The first direction is that it shall sink into the residue of the estate, but that, of course, is no gift to any one else.

But then there is a direction that it shall be disposed of "as after mentioned," and when you come to that to which the words "after mentioned" refer, you find a direction that it shall "sink into the residue of the personal estate, and be disposed of accordingly."

The question is, whether the direction that a share of the residue previously undisposed of is to be disposed of accordingly, is a gift to the residuary legatees. My opinion is, that it is not. I cannot find any gift to the residuary legatees in these words,

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 v.
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 Judgment.

The other points were hardly argued, and indeed are scarcely arguable.

On the second point, it is plain that the heir-at-law must take, and take as personalty, whatever part of this one-third share consisted of real estate.

The third question is, I think, answered by the terms of the release itself. Whatever right Mr. *Locke* may have to any part of this share as one of the coheirs-at-law or next of kin is expressly reserved to him, all other right (if any) seems to me to have been released.

Nov. 7th &
 17th.

*Will—Shares
 in a Public
 Company—
 Calls.*

The rule, that a specific legatee of shares liable to calls must take them cum onere, does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares,) as an entire fund.

The true test is, whether the shares have or not been separated from the general residue at the date of the call.

IN RE BOX.

THIS was a petition for the advice of the Court under the 65th section of *Lord St. Leonard's Act (a)*, under the following circumstances:—

John Box, the testator in the case, by his will dated the 30th December, 1859, after bequeathing certain pecuniary and specific legacies, appointed the Petitioners (one of whom was his widow) trustees of his will, and bequeathed to them the residue of his personal estate upon trust for his wife for life for her separate use, and from and after her decease he directed his trustees to transfer into the name of his brother, *Charles Box*, twenty-six shares in the *Phoenix Gas Company*, and into the names of each of his nieces, *Elizabeth* and *Martha Johnson*, fifty *New Imperial Gas* shares, and into the name of his nephew, *John Box*, "the remaining fifty *Imperial Gas* shares," and he empowered his trustees to permit his personal estate to remain in its then present state of investment, or to vary the investments, in the usual manner; and after several immaterial bequests and directions, he bequeathed the residue of his estate to certain charitable societies.

(a) 22 & 23 Vict. c. 35.

At the time of his death the testator had 150 shares in the *Imperial Gas Company*, 66 shares in the *Phœnix Gas Company*, and several other shares of the like nature, and considerable general personal estate.

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IN RE BOX.
Statement.

After the death of the testator certain calls had been made by the various Gas Companies in which the testator held shares, and it was anticipated that further calls would be made.

It appeared that the shares in question would not, according to the deeds of settlement of the various Companies, or some of them, be transferable so long as any calls were due and unpaid.

The questions for the opinion of the Court were, whether under these circumstances the general personal estate of the testator, or the shares in respect of which any call had been or should thereafter be made, was the proper fund for payment of such call,

1st. Generally. 2nd. During the lifetime of the tenant for life.

Mr. *Hanson* for the Petitioners submitted the case to the Court, and referred to *Wright v Warren* (a), *Blount v. Hipkins* (b), *Jacques v. Chambers* (c), *Clive v. Clive* (d).

Argument.

Mr. *Erskine* for the legatees of the shares:—

The cases against us only decide that where there is a complete severance of the shares from the general estate at the death of the testator, there the legatees must take cum onere; the case is very different where (as here) there is a tenant for life of the whole fund, and no severance of these shares till her death.

(a) 4 De G. & Sm. 367. (b) 7 Sim. 51. (c) 4 Railw. Cas. 499.
(d) Kay, 600.

1868.
IN RE BOX.
Argument.

As these shares are not transferrible while any calls are due, the trustees cannot perform their duty, viz. to transfer the shares into the respective names of the legatees, until they have paid all the calls; and, as this is part of their duty as trustees of the will, they must apply to it their own trust fund, i. e. the general personal estate.

Mr. *Lake Russell* for two of the residuary legatees:—

The legatees must stand in place of the testator. The rule is, that the Court looks to the moment of the testator's death; whatever is then wanting to make him a perfect shareholder is to be borne by his general estate; whatever afterwards becomes needful in order to preserve or improve the value of the shares, must be paid by the legatees. This is decided in *Armstrong v. Burnet* (a), and *Day v. Day* (b). The earlier cases, even if the Court would not now refuse to follow them at all, depend upon the fact that the testator had covenanted to pay the calls; which is not the case here.

If the doctrine contended for were to prevail, the residue could never be distributed, at least till every one of these Companies had been wound up or had called up all its capital, which might never happen.

Mr. *F. Wood*, for parties in the same interest:—

It was the intention of the testator that the tenant for life should enjoy the property in specie; therefore she is as much bound to pay these calls as if the estate had been completely administered.

[He referred to *Addams v. Ferick* (c).]

Mr. *Hanson*, in reply:—

The argument ab inconvenienti does not apply to a case

(a) 20 Beav. 424; s. c. 3 Eq. 871.

(b) 1 Dr. & Sm. 261.

(c) 26 Beav. 384.

where there is a tenant for life of the whole, because the fund could not in any case be administered during her life.

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Argument.

These charities are merely intended to get whatever might remain after every possible claim in favour of the widow (and through her of these specific legatees) had been satisfied.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case comes before me under the provisions of *Lord St. Leonard's Act*. I should have preferred having the point regularly raised by Bill, and I in some degree remonstrated against this form of trying the question; as, however, the parties are all anxious to have my decision now, I do not think I ought to refuse to answer the case, which seems to me to come sufficiently within the terms of the Act.

Judgment.

Upon the abstract question, whether, if shares liable to calls are given specifically, the future calls on such shares are or are not payable out of the general estate of the testator, the later cases are all *uno flatu* in favour of the position that the legatee of such shares must take them cum onere. That is, I think, clearly decided by the cases of *Armstrong v. Burnet* and *Day v. Day*, which were referred to in the argument, and by the case of *Fitzwilliams v. Kelly* (a). I observe that the learned Judge who decided *Jacques v. Chambers* and *Wright v. Warren*, founded his decision on the case of *Blount v. Hipkins*; and in *Clive v. Clive* I simply followed *Jacques v. Chambers*, without entering into any examination of the question; so that all these cases rest on the single authority of *Blount*

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IN RE BOX.

Judgment.

v. *Hipkins*; but the recent cases have, I think, established the contrary rule.

The will in this case is peculiar; and I think that under its particular provisions the specific legatees are in such a position as not to subject them to the onus in question.

[His Honour read the bequest, the effect of which has been stated.]

When the case was opened, I at first thought that the gift of the twenty-four *Phœnix* shares was not specific; but I find that in *Jacques v. Chambers* (a) the gift was of a certain number of shares, with a provision that such gift should not be specific "for purposes of ademption;" and the *Vice-Chancellor* thought that for all purposes other than ademption the legacy was specific, and therefore, as there was a sufficient number of shares in existence at the death of the testator to satisfy the bequest, he treated such shares as specifically bequeathed. In accordance with that judgment I should be inclined, were it necessary to decide that question, now to hold the gift of the twenty-four *Phœnix* shares to be specific, as that of the *Imperial* shares certainly is.

In the view I take of this case, however, it is not necessary to decide this point: the widow is still alive, and I have only to say from what fund these calls are now to be paid.

Now, if there had been a gift of these shares simpliciter, to A. for life, with remainder to B., C., D., &c., absolutely, so that the shares would have to be severed from the general estate by the executors, and held separately, it would follow from what has been said, that such shares would be taken by the legatees cum onere, and that the

(a) 4 Railw. Cas. 205.

tenant for life, and those entitled in remainder, would have to provide for the payment of the calls, either out of the shares themselves, or otherwise as they might think fit; the residue of the testator's estate would have nothing further to do with them.

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IN RE BOX.
Judgment.

Here, however, the intention of the testator is, that his wife is to have the enjoyment, during her life, of the whole residue of his estate in one mass, and of course in the manner which is most beneficial for her, and it is not until after her death that these shares are to be taken out and separated for the benefit of the several legatees.

Now suppose for a moment that one of these legatees were an infant, so that it would have become necessary (if these shares are to be taken cum onere) to sell a portion of the shares for the purpose of paying these calls, would not the widow be entitled to say, "No, that must not be done; I have a right to keep these shares in specie, and I prefer that the calls should be paid out of some part of the estate which does not produce so good an income for me." And might she not therefore prevent any payment of calls out of the shares?

Or, again, suppose that one of the legatees in remainder, being adult, had voluntarily paid these calls, and had then applied to the executors to reimburse him, might not the widow have in like manner interfered, and required the payment to be made out of the general estate?

These considerations distinguish this case from that before Vice-Chancellor *Kindersley*.—There it was objected that if the shares were not taken cum onere, it would be impossible to divide the general estate until after the shares had been fully paid up; but no such objection applies here, because the testator himself directs his estate to be kept undivided until the death of his widow; and I

1863.
IN RE BOX.
Judgment.

think that the remaindermen could never, as against the widow, have any right to have these shares specifically dealt with.

For these reasons, I think that the manifest intention of the testator was that there should be no separate dealing with these shares till after his wife's death, and therefore, that during her lifetime all calls must be paid out of the general estate.

Pool-711

Dec. 8th.

Practice—
Parties—Hus-
band and Wife
—Foreclosure.

A Bill to redeem a mortgage on the real estate of a married woman should not be filed by husband and wife merely, but by the wife by her next friend, making her husband a co-Plaintiff. And this is the right course even where the husband is a bankrupt.

SMITH v. ETCHES (a).

THE Bill in this case was filed by husband and wife, to redeem a mortgage made by them of the wife's fee simple estate, and to prevent the completion of a contract for the sale of it under a power of sale contained in the mortgage. The husband had become bankrupt, and obtained his certificate after the date of the mortgage, but some years before the filing of the Bill. The bankruptcy was not noticed in the Bill, but having been set up in the answers, the Bill was amended by making the assignees parties. The suit now came on upon motion for decree.

Mr. Rolt, Q.C., and Mr. F. Morris, for the mortgagee, took the preliminary objection, that the suit was improperly framed, for that the husband had no interest, and the wife was substantially no party at all, the suit being the husband's suit. The Bill ought, therefore, at once to be dismissed.

Mr. Cracknall, for the purchasers, in support of the same objection, referred to *Hughes v. Evans* (b), *Reeve v. Dalby* (c), *Wake v. Parker* (d).

Mr. Daniel, Q.C., and Mr. Cadman Jones in support of the Bill:—

The rule laid down by Lord Redesdale is, that the wife sues with her husband because she is under his

(a) Ex relatione Mr. H. Cadman Jones, who was of counsel for th Plaintiff.

(b) 1 S. & S. 185. (c) 2 S. & S. 464. (d) 2 Keen, 59.

protection, unless they have opposite interests. The cases referred to are cases of separate estate; and here there is no separate estate. *Hope v. Fox* (a) goes a step further than any former case in holding it necessary to have a next friend where there was no separate estate; but that was a case of a power which the wife could exercise without the concurrence of her husband. Here the wife cannot deal with the estate without her husband's concurrence, so that to hold a next friend necessary here, would be going a step further still. The husband, notwithstanding his bankruptcy, retains an interest, as the wife cannot deal with the estate without him.

In *Hope v. Fox* the Bill was not dismissed, but leave was given to amend; and if the Court holds the objection good, the same will be done here.

Mr. *R. Horton Smith* for the assignees, took no part in the argument.

Mr. *Rolt* in reply.

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SMITH
v.
ETCHES.
—
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think that the husband retains an interest, though but a shadowy one, still a sufficient interest to make him a proper coplaintiff; but I am of opinion that there is clearly a want of parties, for if the Bill were to be dismissed, as the suit is the husband's suit, the wife would not be foreclosed. I think that bills by husband and wife to redeem a mortgage of the wife's real estate must have been entertained in former times, but that was before the practice of allowing her to sue by her next friend had been so well established, and I think that such a form of suit is not now the proper one.

Judgment.

The Court, however, is averse from allowing all the expense of bringing a suit to the Hearing to be wasted, and leave must therefore be given to amend by adding a next friend, but the Plaintiffs must pay the costs of the day.

(a) 1 J. & H. 456.

Post 585.
1863.

Dec. 8rd.

*Practice—
Shareholders'
Bill—Costs.*

In a Bill by one shareholder on behalf of himself and all others except the Defendants, to restrain the Directors from improper dealings with the Company's funds; such funds do not belong to the Plaintiff as cestui que trust thereof, so as to entitle him, in the event of success, to his costs thereout as between solicitor and client.

MORGAN v. THE GREAT EASTERN RAILWAY COMPANY. (No. 2.)

THIS was a Bill by the Plaintiff on behalf of himself and all other shareholders in the *Great Eastern Railway Company*, except the Defendants, against the Company and the Directors, praying that the Company and the Directors might be restrained from paying certain dividends therein mentioned to one class of the shareholders, without also paying the corresponding dividends to the other shareholders.

Upon the Hearing of the cause, a decree was made substantially in accordance with the prayer of the Bill.

Mr. *Daniel*, Q.C., (Mr. *L. Bird* with him), for the Plaintiff, thereupon asked for costs as between solicitor and client.

The Defendants are our trustees, and the fund is ours.

Then they propose to deal with this fund in a manner not consistent with the rights of the parties. The Directors, who are in the wrong, should pay costs between party and party personally, and the funds of the Company, as our true funds, should bear the extra costs.

Mr. *Rolt*, Q.C., (Mr. *Knox Wigram* with him). This is a mere hostile decree against all the Defendants; the Company is for the purposes of such a proceeding as this a stranger to the Plaintiffs.

Mr. *Daniel*, in reply:—

If this be not a proceeding by a cestui que trust, the Directors should be personally fixed with all the costs.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If the Plaintiff and those whom he represents were exclusively entitled to this fund, (as, for instance, if any fund had been specifically set apart for the payment of these dividends,) I think that the Plaintiff would have a right to have his full costs out of the fund; but I cannot consider the general funds of the Company as applicable to this purpose. The Plaintiff is, no doubt, in a certain sense, a cestui que trust of all those funds, and it might be that, in a suit for winding up the affairs of the Company, those funds might be treated as his, so as to give him the right now claimed; but, in a suit of this sort, directed to a specific dealing with the dividends, I cannot take that view.

I think the right form of decree will be: Restrain the Company and Directors from dealing with the dividends in the manner proposed, and order the Company to pay the costs as between party and party merely.

1862.
MORGAN
v.
THE GREAT
EASTERN
RAILWAY
COMPANY.
Judgment.

IN RE LONDON AND WESTMINSTER WINE
COMPANY.

THIS was a Petition by a shareholder for winding up a limited Company. It appeared that an advertisement that the Petition would be heard on this day had been inserted in the *London Gazette* on Friday, October 30th, and in the daily papers required by the General Orders (a), on Saturday, October 31st.

(a) G. O. 11th November, 1862, Ord. 2.

Nov. 7th.
Practice—
Winding-up—
Companies
Act, 1862—
Advertisements.

Where a petition for winding up a limited Company cannot be heard on the day appointed by advertisement, by reason of the advertisement

ment not having been inserted in proper time, the practice is to let the Petition stand over for a fortnight, with liberty to insert fresh advertisements. The practice of the Court of Bankruptcy in this respect not followed.

1863.

IN RE LONDON
AND WEST-
MINSTER WINE
COMPANY

Argument.

Mr. *Daniel*, Q.C., (Mr. *J. H. Higgins* with him), was about to open the Petition, when

Mr. *Roxburgh*, for persons asserted by the Petition to be Directors, objected that the advertisements in question had not complied with the Order.

This was admitted, and the only question was, what should be done in consequence thereof.

Mr. *Jessell* for the Company.—The only course your Honour can take is to dismiss the Petition as irregular. It must be presented again and reanswered. This was decided in the Court of Bankruptcy at the time when these Companies used to be wound up there: *Ex parte Martin* (a).

Mr. *Giffard*, Q.C., and Mr. *T. A. Roberts*, for creditors, supported this argument.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

It is not according to the course of this Court to involve parties in unnecessary costs on points purely of form. Whatever the Court of Bankruptcy may have thought itself called upon to do, I cannot think it right, sitting here, to dismiss this Petition. But I cannot properly hear it till all parties interested have been summoned by proper advertisements, which cannot now be done in time for next petition day.

Let the Petition stand over till this day fortnight, with liberty to insert fresh advertisements for that day.

(a) 9 W. R. 20.

1863.

EGMONT v. DARELL.

THE Plaintiff in this suit was the heir of *Henry Earl of Egmont*. The Defendants were persons claiming under Sir *Edward Tierney*, who had been the Earl of *Egmont's* confidential agent and solicitor, and to whom the Earl had devised all his real and personal property in *Great Britain* and *Ireland*, subject to certain legacies.

The Earl had died on the 23rd of December, 1841, entitled in fee, subject to incumbrances, to large estates in *Ireland*, and to estates of comparatively small value in *England* and *Wales*.

At the time of the filing of the Bill, no real property in *England* and *Wales* was held by the Defendants under the will, the whole having been sold in the year 1856, and the proceeds applied in payment of mortgages, which affected all the estates.

The Plaintiff had instituted proceedings (which were still pending) in the Court of Chancery in *Ireland* to set aside the will with respect to the *Irish* estates, and for a conveyance of the outstanding legal estate, offering to redeem the mortgages thereon.

The present Bill, which was filed in December, 1860, alleged that the will was obtained by fraudulent misrepresentations, and prayed that an issue *devisavit vel non* might be directed, for the purpose of trying the validity of the will as regarded the real estate in *England*; that any unsold estate might be conveyed to the Plaintiff, he offering to redeem any mortgage which ought—as between him and the Defendants—to be considered unsatisfied; for an account of the rents and profits of the devised estates, and

Jan. 15th,
18th, & 21st.
Practices—Heir
—Issue—Roll's
Act (25 & 26
Vict. c. 42).

On a bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the Court is bound, under *Mr. Roll's Act*, to determine the question, without remitting the parties to an action at law. But, by analogy to the old practice, the Court will in general, in such cases, direct a trial by jury, and (with a view to the contingency of a motion for a new trial) will direct the trial to be before itself.

1863.
EGMONT
v.
DARELL
—
Statement.

of the moneys applicable to the discharge of incumbrances upon them, including the personal estate of Lord *Egmont*, and for a receiver. In this way the validity of the will came incidentally in question, and formed the chief contest in the suit.

No decision was ultimately called for on the questions of fact involved, and only so much of the case will be reported as relates to the points of law and practice discussed by the Vice-Chancellor.

Argument.
—

Sir *H. Cairns*, Mr. *Giffard*, Q.C., and Mr. *Wickens* for the Plaintiff, argued, that, upon the evidence, it was clear that the will was fraudulently obtained, and that the Plaintiff was, at any rate, entitled to an issue.

The *Solicitor-General* (Sir *Roundell Palmer*), Mr. *James*, Q.C., and Mr. *J. Pearson* for the principal Defendants, Sir *Lionel* and Lady *Darell*, argued in support of the will, and also contended, that, primarily, the right of an heir was simply to have terms or other obstacles to an ejectment put out of the way, and that the direction of an issue was merely substituted for convenience of procedure in certain cases, and not for the purpose of enlarging the rights of the heir. Therefore, in a case like this, where no action could be brought, and where, consequently, the heir was not entitled to his ordinary remedy, the Court would not improve his position by granting the substituted remedy. Now here there could be no action of ejectment, for two reasons—one, because there was no land in *England* to form the subject of the action; and the other, because the Statute of Limitations, though it had not run at the filing of the Bill, had since become a final bar to an action. Independently, therefore, of the validity of the will, there could be no issue.

They further contended, that the recent Act(a) prohibited the Court from directing an issue, and required it to determine all questions of law itself; and that, if there was to be a trial, it could only be by summoning a jury in this Court, the enactment clearly applying to every possible case, with the single exception provided for by the 4th section.

1863.
EGMONT
v.
DARELL.
Argument.

Mr. Willcock, Q.C., and Mr. Baily for the executors of Miss *Perceval*, who was heiress-at-law of the testator at the time when the *English* estates were sold.

Mr. Cracknell for Lady *Tierney*.

Sir H. Cairns, in reply :—

The heir has at any time, up to the last day of the twenty years, an absolute right to an issue to try the validity of an alleged will, irrespective of the evidence on the point; and we need not have gone into any evidence but for the purpose of explaining the delay, and showing that it did not arise from our laches. It is true, that it was a common practice to direct an action putting terms out of the way; but in cases where an action is impossible, as it is here, the right of the heir is to have the question tried upon an issue directed by the Court. This was the old practice, and the recent Act has not altered it. On the other side it is contended, that the recent Act has given a new jurisdiction to this Court, to decide on the validity of wills of real estate coming incidentally in question. But, in truth, the Act gives no new jurisdiction at all. It merely renders compulsory what was optional under the Act of 1852(b). That statute had prohibited the sending of cases to a Court of Law, but it left it optional with the Court to direct an action. Now, in the cases contemplated by the Legislature,

(a) 25 & 26 Vict. c. 42.

(b) 15 & 16 Vict. c. 86.

1863.
 EGMONT
 v.
 DARELL.
 —
Argument.

the option is taken away, and the Court is required to decide incidental legal questions for itself. If, therefore, the Court has now a jurisdiction to decide such questions as this, which it is bound to exercise, it has equally had the jurisdiction since 1852, although its exercise was optional. Now it is quite settled by the whole course of decision since 1852, that the Chancery Improvement Act did not enable the Court to decide for itself on the validity of a will of real estate; and if that is so, then the recent Act does not either compel or enable the Court to do so. The two statutes are co-extensive as to the jurisdiction, though the one makes that compulsory which before was optional; and as it is settled that the Act of 1852 was not meant to relate to questions of this kind, where the ground of relief is the alleged invalidity of a will of realty, but only to incidental legal questions arising in a suit where the Court had jurisdiction according to its ancient practice, so it follows that the recent Act is also limited in the same way.

The recital of this statute is conclusive in favour of this view, and shows that the object was not to enlarge the jurisdiction, but to compel the Court to exercise the jurisdiction which it already possessed. The 4th section is not an exception, excluding by inference every other exception, but a mere proviso introduced *ex abundanti cautela*.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am not now about to decide this case, but I think it right to say, that, in my own opinion, two or three important considerations arise.

The first point, which is of undoubted importance, is,

whether this Court not only has jurisdiction, but is bound to determine the question of the validity or the invalidity of this will, arising, as it does in this Court, incidentally on a Bill filed for the purpose of having certain moneys applied in the redemption of an *Irish* mortgage.

1868.
EGMONT
v.
DARELL.
Judgment.

The next question, which is involved in the former, is, whether or not the Act passed in the last session of Parliament removed the possibility of this Court sending to a Court of Common Law the trial of a question such as this, and whether it did or did not impose on this Court the necessity of determining it itself.

Then, thirdly, there is a question of great importance, what discretion this Court has as to the mode of trial. If I am bound to determine the question myself, am I, by analogy to the old practice, also bound to determine it through the medium of an issue? At present, the inclination of my mind is, that I ought not to send the case to a Court of Law. But, at the same time, it is a very grave question, whether, by analogy to all that has been done before, I ought not to direct a trial by a jury. The decision would be subject to the question—how far the lapse of time, or the acts of the heir, or other circumstances, may or may not have given the Court a discretion to say, whether it is fit, under existing circumstances, that the case should be tried through the medium of a jury.

I feel the extreme gravity of these questions, and should not have thought it necessary to have said a word at the present time, were it not for the pendency of the suit in *Ireland*, and in order to intimate the course I should take, if it should become necessary to give judgment before the litigation in *Ireland* has come to an end. In that case (if I finally remain of the opinion which I entertain at present, that I am not at liberty to direct an action), I

1863.

EGMONT

v.

DARELL

Judgment.

should try it myself in this Court; and for this reason: I entirely concur in the justice of the view which seems to have been entertained by Lord *Eldon* (a), that wherever it was proper to have a case tried by a jury, the right course was, not to direct an issue, but rather to direct terms to be set aside in an action, so that the motion for a new trial might go before that Court by which the case had been tried: it would be inconvenient to direct an issue, because the motion for the new trial would be made here; whereas, if an action were directed, the motion for the new trial would go before the Court of Common Law, and they would finally dispose of it. Following exactly the same principle, if I finally come to the conclusion that there should be a trial by a jury, I shall have it tried here and not elsewhere, so that any motion for a new trial may be made before the Court which tried the issue. At present, I have not made up my mind as to whether there ought to be a trial or not.

March 6th.

VICE-CHANCELLOR SIR W. PAGE WOOD.—I have had this cause put into the paper, for the purpose of explaining why, notwithstanding my anxiety to dispose of it at once, it appears to be improper to do so, having regard to the position of the litigation in *Ireland*.

It would, certainly, not be proper—in a case where the Courts of this country and of *Ireland* have concurrent jurisdiction over the same question—to wait for the decision of the *Irish* Courts before pronouncing judgment. It is not with any view of that kind that I intend to postpone my judgment. The real question which causes the difficulty, is, whether the rights of the parties in this suit may not be affected by the results of the *Irish* suit, quite irrespectively of the view I might take of the controversy raised before

(a) See *Pemberton v. Pemberton*, 11 Ves. 50.

me. And this clearly would be so. The nature of this suit is such, that it is impossible to come to any conclusion until I know what the position of the parties is with reference to the *Irish* lands—whether, in short, the Plaintiff has or has not a right to redeem the mortgages thereon.

1868.
EGMONT
v.
DARELL.
Judgment.

The main contest before me turns upon the claim of the Plaintiff to have a large sum of money applied towards the liquidation of the mortgages in *Ireland*. This suit, therefore, is ancillary to the *Irish* proceeding, and the whole contest in this Court as to the will (there being no land in *England* affected by the dispute) depends entirely on the preliminary question, whether any right exists in the Plaintiff to redeem the *Irish* estates. [His Honour then pointed out in detail, that, as to the great mass of the sums claimed, the Plaintiff would have no right whatever, whether the will were good or bad, except on the assumption of a right to redeem the *Irish* mortgages.] If the decision should be that the Plaintiff is entitled to redeem the *Irish* estates, then I apprehend there would be a clear right to have all these large sums of money applied for the purpose, if the will were out of the way; and, even without setting aside the will as regards the *English* land, the Plaintiff would be entitled to have some of these moneys, which formed the pure personal estate of Earl *Henry*, so applied, because the right of the heir is to have the mortgages paid off out of the personal estate. There would, therefore, be some relief (if the right to redeem exists), whichever way I might decide the question as to the validity of the will.

That compels me to consider the case from this point of view. If I had come to the conclusion, that, whatever the decision in *Ireland* may be, some relief will have to be given here, it would be very improper to await the result of the

1863.
 EGMONT
 v.
 DARELL.
 Judgment.

Irish suit. But, it appears to me, that this is not the position of the case. If it should be determined in *Ireland* that the Plaintiff has the right to redeem the *Irish* mortgages, then I am of opinion, that, irrespectively of the validity of the will as to the real estate in *England*, there would be a right to have the personalty applied, which would be sufficient to sustain the Bill. On the other hand, my present impression is, that, if the right to redeem the *Irish* mortgages is not established, this Bill ought to be dismissed altogether. Whether this would be so or not, turns upon two points that were argued very strongly by Sir *H. Cairns*; first, whether the Court, under the old practice, had any and what discretion, or whether the heir was entitled to an issue as of right; and, secondly, how far the practice is affected by Mr. *Roll's* Act.

I stated, at the close of the argument, what the jurisdiction of the Court was. The contention was, that the simple province of the Court was to remove obstacles in the way of a trial at law. But, in the first place, one may remark, that, in the ordinary course of a suit to try the validity of a will soon after the event, there are two courses open. The more common one is, to remove the terms or other obstacle to a trial at law, and to direct an action of ejectment. The other is, to direct an issue to try the case; and then the whole matter would not be remitted to law, but a new trial would be moved for, if necessary, in this Court.

But no authority was cited, nor can I find any as to the course to be pursued when not a single acre of land is left, and the ordinary proceeding by directing an action of ejectment is, therefore, impossible. Nothing can be done except to direct an issue. And, in such a case, the Court of Chancery must, under the old practice, have directed an issue for the purpose of informing its own conscience.

However, the case is, in my opinion, materially altered by Mr. *Roll's* Act. It was argued strongly, that, if I gave such a construction to this Act as was contended for by the Defendants, I should be assuming a jurisdiction which was never intended to be conferred. It is urged, that by the Act of 15 & 16 Vict. c. 86(a), it was already enacted, that cases should not be sent to law, and that the Court might determine a legal title without requiring the parties to proceed at law to establish the same; and then it is said, that if I held the Court bound, under Mr. *Roll's* Act, to take into its own hands the decision of a question relating to the devise of real estate, the Court must, by parity of reasoning, be considered to have had a similar jurisdiction (though a discretionary one) under the former Act. I am not so clear that that would be a *reductio ad absurdum* if it were so. But the new Act is worded very differently from the former statute, and appears to me to take away any discretion on the subject, because the first section enacts(b), "that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery is or shall be sought in any cause or matter, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same Court."

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 EGMONT
 v.
 DARELL.
 Judgment.

The words are as complete as they could be, and it is impossible to shrink from the consequence—that I am bound to decide every question, legal or equitable, which may arise in the course of any investigation before me. And this is made, if possible, clearer by the exception in the 4th section, which provides, that, where the object of

(a) Sect. 61.

(b) 25 & 26 Vict. c. 42.

1863.
EGMONT
v.
DARELL.
—
Judgment.

a suit in equity is to recover or defend the possession of land under a legal title, or under a title which would have been legal but for some outstanding term or mortgage, such relief only shall be given as would have been proper, according to the rules and practice of the Court, if this Act had not passed. So that the Legislature appears to have contemplated the possibility of a case, such as it is contended that this case is, in which a Court of Equity would simply set aside terms and other obstacles ; and in a case within that proviso the Legislature leaves the Court to pursue its old course, neither extending nor restricting the jurisdiction.

The proviso, however, has no application to the present suit. The question before me is simply a money right. None of the property within the jurisdiction of this Court consists of land, and, in fact, it would be impossible to send the case to law for trial in an action. Looking to this circumstance, I am of opinion, therefore, that, assuming a case to be made out sufficient—having regard to all the circumstances—to warrant an inquiry as to the will, I am bound to try it by means of an issue.

If the decision in *Ireland* should be adverse to the Plaintiff, the main foundation of this suit will be cut away, and in that case it might be proper to dismiss this Bill. If, on the other hand, the Plaintiff succeeds in *Ireland*, he will have a title to some relief, whatever may be my view as to the will ; and, in such a case, the fact of his having a right to some relief might be very important to consider, with reference to the propriety of granting an issue as to that part of the relief which would depend on the validity of the will. The result of the *Irish* suit would, therefore, form one of the most material circumstances to be considered in this suit.

On the other hand, the decision of this suit can have no effect on the position of the parties in *Ireland*. It would merely be a judgment on a similar question. If I decided against the Plaintiff, there would only be so much less money applicable to the mortgages; but the right to redeem, which is in controversy there, would in no way be touched by this circumstance.

1868.
EGMONT
v.
DARELL.
Judgment.

For these reasons, therefore, the cause will stand over for judgment, until it is determined in the *Irish* suit whether or not the Plaintiff is entitled to redeem.

NOTE.—The cause in *Ireland* compromised. No further judgment, therefore, was pronounced but before verdict the case was in the *English* suit.

EADEN v. FIRTH.

THIS was a motion for injunction. The Plaintiff was a house-owner at *Sheffield*, and the Defendants were manufacturers of steel there, who had recently erected an enormous steam hammer on premises adjoining the Plaintiff's house. The Plaintiff produced evidence to show that the inmates of his house could not sleep in consequence of the noise and rocking produced by the hammer, and he moved for an injunction to restrain the nuisance.

July 20th.
Jurisdiction—
Nuisance—
Practices—25 &
26 Vict. c. 42.
A bill to restrain a nuisance is within the provisions of Mr. Rolt's Act (25 & 26 Vict. c. 42); and the Court has no longer the power to require the Plaintiff to establish his right at law.

Mr. Rolt, Q.C., and Mr. Rodwell, for the motion.

But this does not affect the Defendant's right to have the question of nuisance or no nuisance decided by a jury.

Principle on which the Court acts in determining whether or no to grant injunctions in such cases.

Semble, this Court will not, ordinarily, try a question of nuisance before itself, unless the acts complained of have been done in *London* or *Middlesex*, but will direct an issue.

1863.

EADEN

v.

FIRTH.

Argument.

Sir *Hugh Cairns*, Q.C., and Mr. *Marten*, contra, were not heard.

The VICE-CHANCELLOR asked Sir *Hugh Cairns* whether he desired to have the question tried by a jury.

Sir *Hugh Cairns*.—Certainly.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

There is a very serious question to be tried in this case ; and I certainly should not determine it without giving the Defendant, as he desires it, the opportunity of taking the opinion of a jury upon the point. I do not say that there is no case in which this Court would act at once ; if I could see clearly, for instance, that there could be no possible defence, or if it were a case in which there was no conflict of evidence whatever, then, notwithstanding Lord *Cottenham's* well-known dictum, that there should be no perpetual injunction without an action," I should feel myself authorised to act at once without putting the parties to any further expense and delay.

Then, as soon as it is clear that an action (or what, but for the recent statute, would have been an action,) is to be tried, the only remaining question is, whether the balance of convenience is in favour of or against the issue of an interlocutory injunction.

If I found any real apprehension of serious and immediate injury to health, or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the meantime ; but in this case I see nothing except annoyance apprehended by the Plaintiff : and I certainly think that on the question of balance of convenience I ought to refuse the injunction. But for the operation of the recent Act the proper course would have

been to direct the motion to stand over, with liberty for the Plaintiff to take such proceedings at law as may be required ; and I will follow that course as nearly as the Legislature will permit me to do, by ordering this motion to stand over till after the trial of the issue which I now direct.

Mr. *Rolt* urged, first, that I should decide this question myself without a jury ; and, secondly, that if I required a jury I should summon one here before myself.

On the first point, I do not think that the Act intended to introduce any alteration in the principles on which this Court acts ; and therefore I consider that the Defendant is still entitled to carry his case to a jury in any instance in which he would, before that Act, have been entitled to require the Plaintiff to establish his right at law ; and accordingly I did not hear Sir *Hugh Cairns* on the merits of the case, so soon as I heard that he desired to go to an issue.

On the second point, I see no reason in a matter of this kind for withdrawing the question from the jury which would naturally have had to try it if the Plaintiff had in the first instance gone to law, more especially as I know that *Middlesex* and *London* jurors complain very much, and not without reason, of the great amount of extra work which is thrown upon them by the practice of trying country causes in town. I will, therefore, direct an issue to be tried at whatever town on the Northern Circuit the parties may agree upon.

Sir *Hugh Cairns* suggested, that the question ought to be raised by indictment ; and he instanced *Reg. v. United Kingdom Electric Telegraph Co. (a)* : but Mr. *Rolt* objecting to take that course, it was ultimately arranged that an issue should be directed, to be tried at *Liverpool* at the present Summer Assizes, "Whether the Defendant had or not worked his steam hammer in such a manner as to occasion a nuisance to the Plaintiff."

(a) 10 W. R. 538.

1863.

EADEN

v.

FIRTH.

Judgment.

1863.

Nov. 18th,
19th, & 20th,
Dec. 7th.

Award—9 of
10 Will. 3, c. 15
— Bankruptcy
— Delay—Same
Defence avail-
able at Law
and in Equity.

Where the sub-
mission to arbi-
tration does
not contain an
express agree-
ment enabling
the parties to
make it a rule
of Court, the
award is not
brought within
the provisions
of the Act of 9
& 10 Will. 3,
c. 15, by force
of the Common
Law Procedure
Act, 1854, s. 17;
nor has the
Bankrupt Law
Consolidation
Act, 1849, s.
132, this effect.

But, in such
a case, this
Court will fol-
low the course
taken by the
Courts of Com-
mon Law, and
adopt a rule of
its own in ana-
logy to the
limitations of
the statute.

Therefore,
where the
Plaintiff had
suffered the
next term

after the publication of the award to elapse without taking any steps to set it aside, and had afterwards unsuccessfully pleaded nul tiel agard in an action on the award:—*Held*, that, although the award could not have stood if the matter had been fresh, it was then too late for the Court to interfere.

SMITH v. WHITMORE.

BILL to set aside an award.

In the year 1855, the Plaintiff and the Defendant *Bainbrigg* entered into partnership as brewers and maltsters in *Prussia*.

On the 23rd June, 1856, an agreement for dissolution of the said partnership was entered into between the parties, and the concern was accordingly wound up.

In the year 1858, the Defendant *Bainbrigg* filed a petition for protection in the District Court of Bankruptcy at *Birmingham*, and such protection was accordingly granted, and the Defendant *Whitmore* was appointed official assignee to act in the matter of the petition; and the Defendant *Bainbrigg* assigned all his property to *Whitmore*, in trust for his creditors, until their claims were satisfied.

The Plaintiff made a claim against *Bainbrigg's* estate in respect of certain partnership transactions, and the Defendants made counter claims against the Plaintiff, and the question was thereupon referred to the arbitration of two accountants.

The submission was in the following terms:—

“In the Matter of a Private Arrangement of Mr.

William Henry Bainbrigg.

“It is agreed, that the accounts between Mr. *William Henry Bainbrigg* and Mr. *Gilbert Smith* shall be taken

by Mr. *John Percival*, of *Birmingham*, and Mr. *Samuel Daniell*, of the same place, and the balance ascertained; that neither party shall be at liberty to re-open the accounts; and that any balance found due from Mr. *Bainbriggs* shall be proveable upon his estate, and that any balance found due from Mr. *Smith* shall be recoverable by the trustee or trustees under the said petition for a private arrangement; the transactions of Mr. *James Smith* to be considered as the transactions of Mr. *Gilbert Smith*; and in case of any disagreement between the above accountants, they shall have power to nominate an umpire. Dated this 30th of August, 1858."

1863.
SMITH
v.
WHITMORE.
Statement.

On the same day an order of the Court of Bankruptcy was made by the Registrar, sanctioning the proposed arrangement, and directing that the matter should be referred to arbitration as agreed.

The arbitrators appointed one Mr. *Rotton* as their umpire. He at first declined, saying that it would take up too much of his time. They represented to him that his services would not be much required; and he agreed to act on the footing that he was to be consulted on points arising under the reference as to which the arbitrators felt a difficulty, but that he was not to be called upon to attend the meetings, nor to hear evidence, nor to do more than advise the arbitrators on points on which they felt a difficulty.

The Plaintiff's solicitor agreed to this arrangement.

Several meetings took place before the arbitrators in the absence of *Rotton*, and they were attended by the solicitors for the parties in the usual way.

On three occasions the arbitrators differed in opinion,

1863.

SMITH

v.

WHITMORE.

Statement.

and they on each of such occasions referred the matters in question to *Rotton*, in the absence of the parties.

In one instance the question was, whether an adjournment should be granted, and upon what terms; and in another, there was a question whether or not certain evidence should be received. On neither of these occasions was any objection taken by either party to the course pursued.

The third of the occasions in question occurred after the meetings had been closed: the arbitrators felt a difficulty upon certain points practically involving the main question in dispute (the allowance or disallowance of a claim amounting to about £5000); and it appeared that they had not attempted to discuss the matter between themselves, but had agreed at once to be bound by the opinion of *Rotton*.

It further appeared that Mr. *Morgan*, the solicitor for the Plaintiff, had met one of the arbitrators in the street, and then and there told him that he (*Morgan*) objected to the matters in question being submitted to *Rotton*, unless he were attended by the solicitors of the parties, and had the points duly argued before him; but the arbitrators, notwithstanding such objection, went by themselves before *Rotton*, and took and acted upon his opinion.

On the 9th June, 1859, the arbitrators made their award, whereby they awarded "and certified to the Honourable the Commissioner of the Court of Bankruptcy for the *Birmingham* District" that there was the sum of £364 2s. due from the Plaintiff to the Defendant *Bainbrigge*, or his assignee.

In October, 1859, the Defendant *Whitmore* applied to the Court of Bankruptcy, and obtained a rule nisi for leave to bring an action on the award; and on the 2nd Decem-

ber, 1859, the Plaintiff appeared to show cause against the rule; but the Court, on argument, made the rule absolute.

The Plaintiff afterwards moved in the said Court for the discharge of the said rule; but that motion was refused.

The Defendant *Whitmore* thereupon brought an action in the Court of Exchequer upon the award, to which the Plaintiff pleaded "nul tiel agard," and issue was joined thereon.

This issue was tried at the *Staffordshire* Spring Assizes, 1860, before Mr. Baron *Bramwell*; when the learned Judge stopped the case, and directed a verdict to be entered for the Defendant at law (the present Plaintiff), leave being reserved to the Plaintiff at law to move to set aside that verdict, and instead thereof to enter a verdict for himself for the sum of £364 2s.

Accordingly, on the 19th of April, 1860, Mr. *Huddleston* obtained a rule nisi to enter the verdict for the Plaintiff, on the ground that the award was the award of the arbitrators, and that the fact that the arbitrators had taken and acted upon the opinion of Mr. *Rotton* did not vitiate the award, and that even if the arbitrators had acted improperly in this respect, such misconduct was not admissible in evidence under the plea in question or pleadable in bar to the action on the award.

On the 5th June, 1860, the present Plaintiff showed cause against the said rule, and upon the argument thereof (a) such rule was discharged.

The Defendant *Whitmore* appealed from this decision to the Court of Exchequer Chamber; and on the 2nd December, 1861, that Court reversed the decision of

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(a) Reported 5 H. & N. 824.

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the Court below, and directed a verdict to be entered for the Plaintiff at law (a).

On the 7th March, 1862, this Bill was filed.

Evidence was taken in the suit at some length, and all the proceedings in bankruptcy were imported into the case: but, save as aforesaid, nothing appeared therein which was material to any of the points raised and decided.

The cause now came on for Hearing.

Argument.

Mr. Rolt, Q.C., Mr. Gray, Q.C., and Mr. Druce, for the Plaintiff:—

The question for the Court is—is there any jurisdiction or enactment to oust the jurisdiction of this Court to set aside this award? If this were an award under the statute of *William III.*(b), the case would be concluded against us; we could only act by making the award a rule of Court, and we should now be too late to impeach it: *Heming v. Swinnerton* (c). But that statute only applies where there is an express agreement to make the submission a rule of Court.

Then comes the Common Law Procedure Act, 1854(d), which provides that any submission to arbitration may be made a rule of Court, and that, *when made* a rule of any Court, no other Court shall have jurisdiction. This award has never been made a rule of any Court.

The Bankrupt Act contains no provisions affecting us. In the first place, this was not a bankruptcy, but a proceeding

(a) Reported 7 H. & N. 509.

(c) 1 C. P. Coop. 386.

(b) 9 & 10 Will. 3, c. 15.

(d) 17 & 18 Vict. c. 125, s. 17.

under the private arrangement clauses. Even if it were a bankruptcy, there is no provision for making the submission a rule of that Court. The Commissioner has power to direct it to be made a rule of a Superior Court, or he may direct an action to be brought. The only object of going before him is to get his sanction on behalf of the body of creditors(a).

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The decision of the Court of Exchequer Chamber merely determines that the conduct complained of did not make the award so utterly void as to justify a plea of no such award(b): and a special plea of the facts would have been bad: *Dresser v. Stansfield*(c).

There has been no acquiescence; we obtained a verdict, and therefore were not called upon to move till after that verdict had been set aside. The judgment of the Court of Exchequer Chamber was not delivered till December, 1861, and the Bill was filed in the following March.

We did not learn, till the evidence was given at the trial, that the very evils which we had anticipated as likely to result from the irregular conduct of the arbitrators, had actually occurred in fact. The discovery of this fresh evidence, if too late to be used as a defence to the action, is a ground for the interference of this Court: *Jarvis v. Chandler*(d); *Farquharson v. Pitcher*(e); *Bateman v. Willoe*(f).

On the merits it is clear, that, if your Honour has jurisdiction to deal with it, this award cannot stand. The arbitrators own that they not only went before *Rotton* on a statement of their own in the absence of the parties, but also surrendered their own judgment entirely to his. This

(a) 12 & 13 Vict. c. 106, s. 153.

(b) 7 H. & N. 518.

(c) 14 M. & W. 822.

(d) T. & R. 319.

(e) 2 Russell, 81.

(f) 1 Sch. & Lef. 201, see p. 205.

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vitiates the award: *Morgan v. Great Eastern Railway Company*(a); *Newry and Enniskillen Railway Company v. Ulster Railway Company*(b).

Harrison v. Nettleship(c), which will be relied on by the other side, decides nothing more than that this Court will not sit to hear an appeal from a Court of Law,

The VICE-CHANCELLOR.—If you have a defence which you may raise either at law or in equity, and you choose to take your chance there and fail, you must not afterwards come here(d).

[They also referred to *Veale v. Warner*(e), *Mills v. Bayley*(f), *Nicholls v. Roe*(g), 3 & 4 Will. 4, c. 42(h), *Wills v. Maccarmick*(i).]

Mr. Amphlett, Q.C., Mr. Prendergast, and Mr. Dowdeswell for the Defendant:—

1st. This case is within the Statute of *William III.*

2ndly. If not, the Court will follow the analogy of that statute, and will not act where there has been a more convenient mode of raising the question, which has not been taken advantage of.

3rdly. The question has been tried and decided at law, and the Plaintiff is bound by the decision.

4thly. All the relief claimed by the Bill might, if the Plaintiff were entitled to it, have been obtained in the Court of Bankruptcy.

(a) 2 N. R. 536, sub nom. *Eastern Counties Railway Co. v. Eastern Union Railway Co.*

(b) 8 D. M. G. 487.

(c) 2 M. & K. 423.

(d) See *Thornton v. McKewan*, ante, p. 525.

(e) 1 Wms. Saund. 326 a; see 327 c, in notis.

(f) 32 L. J. Ex. 179.

(g) 3 M. & K. 431.

(h) Sect. 39.

(i) 2 Wilson, 148.

5thly. The Plaintiff is bound by lapse of time.

1st. The effect of the statute of *William III.* and the Common Law Procedure Act taken together is, that every submission to arbitration now imports an agreement that it may be made a rule of Court.

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But, when actually so made, the Courts have no power to set it aside, except that given by the Statute itself; therefore every award when made a rule must be dealt with under that statute; and that being so, the principle of *Heming v. Swinnerton* applies. Before that Act no award could be enforced or set aside by a Common Law Court, nor could any such Court have entertained any question as to misconduct said to have been committed by the arbitrators, unless it amounted to manifest corruption: *Anderton v. Cozeter* (a). All that the Court could do was to refuse to enforce it actively: *Hales v. Taylor* (b). Then in cases of references ordered in actions, which are not within the statute, the Courts have always applied the analogy of the statute to the extent of holding that the application must be made while the facts are fresh: *Pedley v. Goddard* (c); *Paxton v. Great North of England Railway Company* (d); *Prentice's Chitty's Archbold* (e); *Russell on Awards* (f); *Rogers v. Dallimore* (g); and there is no case in which they have entertained the application after two terms have elapsed: *Fetherstone v. Cooper* (h), *Dodd v. Platt* (i).

The VICE-CHANCELLOR.—Has the point, whether references under the Common Law Procedure Act are or not

(a) Str. 301.

(b) Str. 695.

(c) 7 T. R. 73.

(d) 8 Q. B. 938.

(e) Vol. 2, p. 1675, 11th edit.

(f) Pt. III., ch. ix., s. 2: p. 642.

(g) 6 Taunt. 111.

(h) 9 Ves. 67.

(i) 6 Jur. N.S. 631.

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within the Statute of *William*, ever come before a Court of Law?

Mr. *Dowdeswell*.—I do not know of any such case. It is practically hopeless to apply after the time limited by that statute, so that the point could hardly have arisen.

2ndly. This Court will act on this analogy. The reasons for their judgment given by the Court of Exchequer Chamber (a) show that the statutory remedy is the more convenient one, and therefore the one to be adopted. And though there is no absolute bar in cases not within the statute of *William III.*, yet this Court would be departing from all precedent and analogy, did it not hold the parties bound, except under some very peculiar circumstances, to come within the time pointed out by that Act.

3rdly. The Plaintiff has taken his chance of success at law. The case he now makes might have been raised in the action by way of plea on equitable grounds (b).

4thly. The Plaintiff himself applied to the Court of Bankruptcy to set aside this award, which was refused. On that occasion the whole case was open to him. Suppose your Honour to direct a reference to determine whether *A. B.* was or not a creditor of *C. D.*, whose estate was being administered, would not your Honour allow him to contest the validity of the award on any ground which might be tenable. This gentleman might have asked the Court of Bankruptcy in *Birmingham* to refer back this award: *Londonderry and Enniskillen Railway Company v. Leishman* c); and he completely submitted to this jurisdiction, for he even afterwards moved to rescind the order giving *Whitmore* leave to sue.

(a) 7 H. & N. 517.

(b) See *Thornton v. M'Kewan*, ubi sup.

(c) 12 Beav. 423.

5thly. There never was a more monstrous proceeding in point of time, and without any reasonable excuse.

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The Plaintiff appeared on the motion for leave to commence the action, and tried to persuade the Court to refuse such leave; why did he not take this ground then? Or if not then, why did not he apply to this Court to stop the trial? It is not stated in the Bill that any new facts came out on the trial: *Eads v. Williams* (a).

Then on the merits of this objection:—the Plaintiff's solicitor never objected to the course taken. It was matter of agreement between the parties that this course should be adopted, and the Plaintiff cannot now complain of it.

The VICE-CHANCELLOR.—In the case of *Morgan v. The Great Eastern Railway Company* (b) neither party went before the umpire, and they had specifically agreed to adopt *Coleman's* principle. They sent Capt. Galton, the umpire, a written statement of the facts, and he referred the accounts to *Coleman & Co.*, and acted on their report. I thought, by analogy to the cases where papers have been laid before experts for advice, that that was sufficient; but the Lords Justices differed from me, and set aside the award. Following that case, I am clear that this award cannot stand, if I reach that point.

Mr. Gray in reply:—

There is a good reason for the distinction between awards under and not under the Act of *William III.* It is important that the submission to so strict a limitation as to time should have been matter of express agreement.

(a) 4 D. M. G. 674.

(b) *Ubi* sup., and reported before the V.C., Id. 441 560.

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Under the Common Law Procedure Act, if any Court has been specified in any way, that Court has, as it were, seisin of the case ; but that has not been done here.

The VICE-CHANCELLOR.—If the award had been made a rule of Court, the Court would have acted on the analogy of the statute.

Mr. Gray.—A Court of Law might have done so, but a Court of Equity will act on its own rules.

The proceedings in the Court of Bankruptcy are immaterial. The assignees are obliged to get leave to sue, in order to entitle them to costs as against the estate ; but that is a matter merely for the creditors under the bankruptcy, with which the Plaintiff, if a debtor to the estate as alleged, would have nothing to do. The Commissioner might have stopped the action, but he could not set aside the award.

The VICE-CHANCELLOR.—Did not he grant a rule nisi for the purpose ?

Mr. Gray.—No ; for the purpose of enabling creditors, if they pleased, to oppose the granting of leave to bring the action.

The provisions in the Bankruptcy Act are merely for the benefit of creditors.

All that Lord *Eldon* said in *Fetherstone v. Cooper* (a) was, that you could not extend your time by changing your Court.

Judgment.

Dec. 7th.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This Bill has been filed for the purpose of setting aside

(a) *Ubi sup.*

an award made in a reference, between the Plaintiff of the one part, and the Defendant *Whitmore*, as assignee under a private arrangement made by the Defendant *W. H. Bainbrigge*, of the other part, and the case comes on under the following circumstances:—The Defendant having made an arrangement under the arrangement clauses of the Bankruptcy Act, 1861, and there being a dispute between him and the Plaintiff with reference to the accounts of the partnership which had existed between them, an order was made by the Court of Bankruptcy in these terms. [His Honour read the agreement above set out (a) and the order of the Court of Bankruptcy sanctioning the same.]

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—
Judgment.

In pursuance of this order one Mr. *Rotton* was duly appointed umpire. The two gentlemen named in the order published what they called their award, dated the 9th day of June, 1859, by which they find that a sum of £364 2s. was due from the present Plaintiff to the estate of the Defendant *Bainbrigge*.

That award, however, was come to in this way:—It is represented, and although the accounts given by the parties are to some extent conflicting I take it to be practically admitted, that *Rotton*, when appointed umpire, refused to devote to the matter so much of his time as would have been necessary to enable him to hear the case fully, but consented to act as a sort of referee, to hear and decide any particular questions in difference between the arbitrators, and that both sides agreed that the arbitrators should be at liberty to consult *Rotton* from time to time, and obtain his opinion on such matters as they arose.

This actually occurred, not merely on one or two occasions of minor importance, but in reference to the allow-

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—
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ance or disallowance of a sum of £5000, which was the principal matter in difference between the parties; and the arbitrators adopted *Rotton's* decision and embodied it in their award; and they signed such award under the impression that they were bound to follow *Rotton's* opinion, although one at least of them did not concur in that opinion, and had not really altered his own view of the case.

The award is now questioned on the ground that under these circumstances it is not the award of the arbitrators, and that the umpire, whose award it is, had not been attended by the solicitors of the parties, and therefore had not had a proper opportunity of forming his judgment on the question. I did not hear a reply upon that part of the case, because I thought that, if the matter were fresh, it could not possibly stand. Taking the case in the most favourable light for the Defendants, I find no agreement that *Rotton's* opinion should be taken behind the backs of the parties; and nothing that had passed on questions of adjournment, &c., in which *Rotton's* opinion had been taken in this informal way without objection on either side, would have affected the rights of the parties to be heard by the person who was in fact the judge to determine upon their case.

The great difficulty I have in this matter is upon the question of time.

The award is dated the 9th June, 1859; so that, had this been a reference under the Act of *William III.*, the last day on which any proceedings could have been instituted for the purpose of setting it aside would have been the 23rd of the following November. Then the Common Law Procedure Act provides that every agreement for reference

in which there is no clause to the contrary may be made a rule of Court, and that when that has been done, that Court of which it has been so made a rule shall alone have jurisdiction over the case; then the Bankrupt Law Consolidation Act has a similar clause, save that under that Act the award is to be made a rule of a Court of Common Law, the jurisdiction of this Court being for some reason or other excluded.

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Judgment.

The result of the two Acts together would seem to be that the present submission, if made a rule of any Court at all, must have been made a rule of one of the Common Law Courts; and that, if that course had been taken, this Court would not have interfered in the case.

Then comes the question (neither party having chosen to make this award a rule of any Court), is the original jurisdiction of this Court in any manner affected by these statutes or any of them? This jurisdiction clearly cannot be taken away simply by the fact that the submission might be made a rule of Court, unless, when so made, such rule would have been subject to the provisions of the statute of *William III.* In that case it is well settled, that, whether ever made a rule of Court or not, this Court, unless it be the Court specified in the submission, is absolutely excluded. But except by force of that statute there is nothing to affect this Court until after some other Court has, as it were, got possession of the cause.

The case has been very ably argued on both sides; but I cannot hold that the late statutes can be read so as to import into awards made under their provisions all the consequences of an award made under the earlier Act. If that had been the intention of the Legislature, they might have effected their object, either by direct reference to the earlier Act, or by saying—not, as they have

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done, that every agreement may be made a rule of a superior Court, but—that every agreement in writing to refer should be construed as if it had contained a clause to authorise either party thereto to make the award a rule of Court. Although even this course would not be so natural as a direct reference to the statutes, still I think that it might have been in such case successfully argued that every agreement to refer would, by virtue of the implied clause, be brought under the statute of *William III.* But the Legislature has not thought fit to take either of these courses, but has simply empowered the parties to make every award a rule of Court; and I cannot hold that this has the effect of bringing every award within the provisions, stringent as they are, of that statute.

Well, then, as I have stated, neither party took the course of making this award a rule of any Court whatever; but, after the time limited by the Act of *William III.* for that purpose had expired, the Defendant *Whitmore*, in December, 1859, brought an action on the award, to which the present Plaintiff pleaded “*nul tiel agard.*”

The course so taken by the Plaintiff can hardly be accounted for, except by the difficulty in which he found himself, in consequence of his having omitted to take any step for the purpose of dealing with this award under the provisions of the statutes, or one of them. I do not think, however, that he has lost anything by this defence to the action. Looking at the short time which elapsed between the decision of the Court of Exchequer Chamber and the filing of the Bill, and considering that the Plaintiff had a right, until that decision, to consider himself successful in the action, I think that everything which it was open for him to do when this plea was pleaded, remained open to him at the time when this Bill was filed. At that time, however, his opportunity for making this

award a rule of Court, for the purpose of setting it aside, had passed; and accordingly this plea, which impugned the award upon the grounds I have already mentioned, was substantially the only defence which it was then in his power to take.

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On the facts appearing at the trial, Mr. Baron *Bramwell* almost stopped the case, and directed a verdict for the Defendant (the present Plaintiff), on the express ground that the award was not the award of the arbitrators, but of *Rotton*; and of that opinion was the full Court of Exchequer.

I have looked carefully over the report of what took place on that occasion, contained in 5 *Hurlstone & Norman*(a), and I cannot find that the argument turned at all on the fact, that the Defendant had, by not proceeding under the statute or otherwise, acquiesced in the award. That Court discharged the rule to enter the verdict for the Plaintiff (the Defendant *Whitmore*), who thereupon appealed to the Court of Exchequer Chamber. On the hearing of this appeal, it was for the first time distinctly argued that it was then too late to take any steps to set aside the award under the statute, and that the plea was bad, because the award was, as a matter of fact, the award of the arbitrators, however they may have arrived at it.

I do not think that that Court went so far as to hold, as Mr. *Gray* seems to say, that on the facts the Defendant was in the right: they seem to have avoided giving any opinion on that point; they thought him precluded from entering into that question, and found against him on the simple ground of pleading.

The judgment of the Court was delivered by Mr. Justice

(a) *Ubi sup.*

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 —
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Willes; and in the course of this judgment he observes, "In truth, this objection, assuming it to be well founded, is one of a sort which ought to be brought forward whilst the matter is fresh, in the manner and within the period prescribed by the statute of *William III.* in cases which fall within its provisions, or by the practice of the Courts in other cases within their summary jurisdiction; a jurisdiction now extending over a large number of cases, which formerly belonged exclusively to the Court of Chancery."

This brings me to observe what is the state of the law as regards the exercise of their discretion by the Courts of Common Law, in cases which do not come within the provisions of the statute of *William III.*

There seem to be two classes of cases :—

1st. Where an action is pending, and by consent there is a rule for a reference of the action merely.

2ndly. Where in such a case the reference is of the action "and all matters in difference between the parties."

In the first case, the Courts seem to have treated the award merely as a proceeding in the action, that is, a decision arrived at through the medium of an arbitrator instead of through that of a jury; and, therefore, they have held that you must act just as if the case had gone on, and a verdict had been taken; that is to say, you must move within the first four days of the next term. But, in the second case, they so far extend the time as to permit the parties to act on the analogy of the statute of *William*, and they have, therefore, allowed either party to come at any time before the last day of the succeeding term, with this further relaxation that, not being bound by the strict wording of the statute, they felt that they might from time

to time dispense with the strictness of their own rule when any special circumstances were found to lead them to take such a course. But they were very sparing in their exercise of this discretion, and required a very special case indeed to be made before they would extend the ordinary time. An instance of the kind of case which they considered sufficient for this purpose may be found in *Sherry v. Oke* (a), where the parties had agreed that the time should be extended ; but that agreement was afterwards set aside for some irregularity, and the Court therefore, in the exercise of their own discretion, extended the time. That may serve to illustrate the principle on which Courts of Law acted in this matter.

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In this case the award was made in Trinity Vacation, 1859 ; and by analogy to this rule the proceedings (if any) taken for the purpose of trying its validity ought to have been taken at latest on the last day of Michaelmas Term. This not having been done, the action was brought in the Christmas Vacation, and the proceedings in the action rendered it impossible for the parties to learn what their rights were for two years, the judgment of the Court of Exchequer Chamber not having been delivered till December, 1861. Then this Bill was filed in March, 1862 ; and the question I have now to decide is, whether or not under all the circumstances and with these dates the award ought now to be set aside.

Now, I see a great disinclination in this Court, as well as in Courts of Law, to exercise jurisdiction with respect to an award which might have been questioned within the time specified in the Statute of *William*.

(a) 3 Dowl. 349.

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—
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The Court should hesitate before departing from the analogy of the rule laid down by the Legislature and the Courts of Common Law. The principle on which both Parliament and the Courts have acted is, that an award should be a final, prompt, and speedy settlement of matters of account; and the Act of *William* was passed expressly to secure parties this benefit, by limiting very strictly the time within which an award could be disturbed. This policy was followed by the Common Law Procedure Act, with some slight variations of detail, but without any alteration of the principle; and the Courts of Common Law have uniformly proceeded on the analogy of this statute, even in cases where their inherent power to act as they thought just was not controlled by Parliament.

This Court has followed the like course, and Lord *Cottenham*, in *Chuck v. Cremer* (a), distinctly laid it down, that, although not bound by the statute, he thought the Court ought to follow it. In reference to this point, I may refer to a passage in Lord *Eldon's* judgment in *Fetherstone v. Cooper* (b), where he remarks, "It is material whether the case is brought here on those grounds the discussion of which is peculiar to Courts of Equity, or additional to those which might have been stated to the Court of Law. Without saying this jurisdiction is shut out, the circumstance of not applying to the Court of Law is a fair ground for this Court to deal less actively for a person who could have relieved himself at law than where the Bill brings forward additional grounds, or grounds peculiar to this Court."

This gentleman might have been relieved at law if he had taken the proper course for that purpose, and had made this award a rule of Court in proper time. I feel very

(a) 2 Ph. 477.

(b) 9 Ves. 67.

strongly the observations of Lord *Eldon* and Lord *Cottenham* in the cases to which I have referred, that it is not for a Plaintiff to move here when he might on the same grounds have gone before a different tribunal.

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Judgment,

To support this Bill would be to allow the Plaintiff to get an advantage from his own laches ; and therefore, although I am clearly of opinion that the jurisdiction of this Court is not touched in any case not within the statute of *William III.*, and that it will look at the case presented to it irrespective of the trammels imposed by that statute, still I hold that it must be a very strong case indeed which would induce the Court to interfere.

This award could not have stood had the application been made in the term immediately succeeding its date ; but when I am asked now to set it aside, I certainly ought not to do so without at least a very strong opinion that there has been not merely a miscarriage on the part of the arbitrators, but some substantial injustice done to the Plaintiff. But upon the merits of this case I am far from feeling sure that, were I to open this award, and direct this account to be taken over again, the result would be materially different from that complained of.

[His Honour then examined the facts of the case, and gave his reasons for thinking that the arbitrators had, however irregularly, come to a conclusion substantially right.]

Under these circumstances I cannot take upon myself to say that a person who has let pass the opportunity of setting the matter right while fresh, and who then sets up an untenable defence to the action, (and that not by any technical slip, but because it was the only defence left him at the

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v.
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—
Judgment.

time,) can now, after that defence has failed him at law on substantial, not technical, grounds, come here with the very same case, and ask this Court for relief.

The Court of Exchequer Chamber based its judgment on the following considerations: [His Honour read the passage(a) beginning "The importance of maintaining this distinction," down to "equitable considerations."] It is urged here that I can do what the Court of law here says that it cannot do; but it seems to me that I cannot do so either. If I disturb this award, I must set the whole thing aside, and have the account simply taken over again; and the only terms I should have the power to impose (and which I should of course have imposed had I determined to entertain this suit,) would be that the Plaintiff in Equity should pay all the costs incurred at law in consequence of the course which he has seen fit to adopt. But these terms would, in my opinion, be wholly inadequate to meet the justice of the case, and I must therefore dismiss this Bill with costs.

(a) 7 H. & N. 519.

BOUCICAULT v. DELAFIELD.

THIS was a bill filed by the author of a dramatic piece (*The Colleen Bawn*), to restrain an infringement of his right of representation by the Defendant who had represented a piece which was proved on the evidence to be a piracy from the *Colleen Bawn*.

For the defence it was among other things alleged, that the Plaintiff had first represented his own play in *New York*, in the *United States*, with which country no International Copyright Treaty exists, and much evidence was gone into on the question whether the piece represented in *New York* was or was not substantially identical with the *Colleen Bawn* as represented in *England*.

1868.

June 29th,
Nov. 10th.Copyright—
Dramatic Piece
—International
Copyright Act
(7 & 8 Vict. c.
12.)The 19th
section of the
International
Copyright Act
(7 & 8 Vict. c.
12) applies to
British subjects
first publishing
in a country
with which no
international
convention
exists.

Sir Hugh Cairns, Q.C., Mr. Southgate, Q.C., and Mr. Dickinson, for the Plaintiff:—

Argument.

The International Copyright Act (a) does not apply to a native born subject : *Russell v. Smith* (b).

The Acts under which we claim are the former Acts which apply to *British* subjects (c), and under the latter of these Acts registration is not necessary.

This Court interferes to protect authors against wrongs of two kinds : 1st. Infringement of copyright. 2nd. The injury which an author suffers from misrepresentation of his works.

Our right on the latter ground is manifest. The placards shew on the face of them an intention to represent their

(a) 7 & 8 Vict. c. 12.

(b) 12 Q. B. 217.

(c) 3 & 4 Will. 4, c 15; 5 & 6
Vict. c. 45.

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play as ours : *Lord Byron v. Johnson* (a). The differences are merely colourable, and are themselves ground of complaint; *Macklin v. Richardson* (b), *D'Almaine v. Boosey* (c). But even at common law you cannot represent an unpublished piece; *Abernethy v. Hutchinson* (d), *Coleman v. Wathen* (e); and representation on the stage is not publication for purposes of copyright; *Murray v. Ellitson* (f). Our play never was printed or published in *America*, and the play acted in *London* is different from that acted there.

Mr. Willcock, Q.C., and Mr. Graham Hastings, for the Defendant :—

1st. As to the alleged infringement of a right in the nature of a trademark.

The only appearance of any such infringement was in our first playbill, which was withdrawn before the Defendant had even heard of the proceedings.

Nothing is said in the Bill about a right to restrain advertisements, irrespective of the right to prevent the performance. This is a mere afterthought.

2ndly. As to the alleged infringement of copyright. The Plaintiff has no right except under the statutes.

The VICE CHANCELLOR referred to *Donaldson v. Beckett* (g), where the judges were 8 to 3 in favour of the existence of the common law right, and 6 to 5 in favour of its being taken away by the statute of *Anne* (h).

Mr. Willcock.—Yes. Therefore the right must be found within the four corners of the statute. The 19th section is the guide. A person publishing abroad is to have the benefit of the Act of *William IV.* (i), if there be *International Copyright*, but not otherwise. But the previous pub-

(a) 2 Mer. 29.

(b) Amb. 694.

(c) 1 Y. & C. Ex. C. 288.

(d) 1 H. & Tw. 28.

(e) 5 T. R. 245.

(f) 5 B. & Ald. 657.

(g) 2 Bro. P. C. 2nd Tomb. 129.

(h) 8 Anne, c. 19.

(i) 3 & 4 Will. 4, c. 15.

lication out of this country destroys the right to any other than international copyright. The test is not the nationality of the author, but the place of first publication : *Clementi v. Walker* (a), *Cocks v. Purday* (b), *Boosey v. Purday* (c), *Guichard v. Mori* (d), *Jefferys v. Boosey* (e).

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A foreigner, denizen here, acquires the right. An *Englishman* publishing abroad has no right, except under the International Copyright Act.

The Plaintiff has stated himself out of court by admitting that he has printed one copy.

The VICE CHANCELLOR.—For the use of Her Majesty.

Mr. *Hastings*.—The true construction of s. 19 is, that “published” is used distributively.

Coleman v. Wathen was a case under the statute of *Anne*, and does not affect this Act.

Mr *Southgate*, Q.C., in reply :—

“Author,” in the construction of the statute of *Anne*, was held to mean “*British* Author;” so here “Author” is equivalent to “author, who is a subject of a country with which there is International Copyright.”

But an author denized here is a *British* author: *Jefferys v. Boosey* (e).

If, the Defendant be right, no registration could have helped the Plaintiff, because there is no International Copyright with *America*. Suppose a person resident here were to send his book over to *America* for publication, and it was published there the day before it was published here, could it be contended that he was not within our own Copyright Act?

The VICE CHANCELLOR reserved judgment.

(a) 2 B. & C. 861.

(d) 9 L. J. O. S. Chanc. 227.

(b) 5 C. B. 860.

(e) 4 H. L. Cas. 815.

(c) 4 Ex. 145.

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Nov. 10th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

In this case one or both of the parties have become bankrupt since the Hearing ; but upon the authorities the course of the Court under such circumstances is to deliver judgment notwithstanding the bankruptcy.

The Bill was filed by Mr. *Boucicault* to restrain the original Defendant from representing a dramatic piece composed by the Plaintiff called the *Colleen Bawn*, which it was alleged the Defendant had produced in derogation of the Plaintiff's rights. The defence was twofold :—In the first place, it was said that there was no such representation ; but upon the evidence I have no doubt that the representations given by the Plaintiff were a distinct piracy on the Plaintiff's composition. The attempts made to disguise the fact have made the matter rather worse than better.

The other defence raises a question of serious importance. It appeared at the Hearing that the Plaintiff had caused the same piece to be represented at *New York* prior to any representation in this country ; and under these circumstances the question is whether the Plaintiff is not, by force of the International Copyright Act (*a*), denuded of the right (if any) which he might otherwise have had.

The 19th section of this statute enacts, that no author of any book or dramatic piece, which shall after the passing of the Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act.

Now this Act is an Act enabling Her Majesty, by a certain course of procedure pointed out in the Act, to extend to authors of certain works first published in

(*a*) 7 & 8 Vict. c. 12.

foreign countries, including dramatic works, the same rights and privileges which are enjoyed in similar cases by authors of works first published in this country.

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It is admitted that Mr. *Boucicault* never complied with the requirements of this Act ; and in fact it was not possible for him to do so, because no Order in Council under the International Act had ever been made to render it applicable to the *United States*. Assuming that under the earlier statutes Mr. *Boucicault* would have been entitled to some rights which this Court could protect, the question before me is, whether the 19th section which I have read has not annihilated any such rights which former statutes may have conferred on persons in the position of the Plaintiff. The argument on this point was that the object of this Act was merely to extend under certain conditions to foreigners publishing their compositions abroad, rights which earlier statutes had given to *British* subjects ; and that therefore it could not be the true construction of the 19th section to read it as intended to take away from *British* subjects rights which they already enjoyed. The generality of the 19th clause, however, is too great to admit of the qualification thus suggested. On the words, there is no escape from the conclusion which the Plaintiff resists, and the whole argument was based on what was said to be the general scope and purpose of the Act.

It is no doubt correct to say, that our own statutes are in general primarily intended for the benefit of *British* subjects, and that the principal purpose of this particular Act was to extend certain privileges to foreigners. At the time when the statute was passed *Jefferys v. Boosey* had not been decided, and I cannot read the Act as referring to that decision. But I must assume the law then to have been as it has since been ascertained to have been. The House of Lords has held that foreigners resident here, and first publishing in this country, are entitled to copyright, and that the object of the several Copyright Acts was to encourage

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the production of new works in this country, and only in this country ; but that a foreigner (and it would seem even an *Englishman*) first publishing abroad would have no such rights. These principles apply as much to dramatic as to any other copyright.

That being so, if Mr. *Boucicault* had first represented his piece in this country, he would have been entitled to the copyright given by the earlier statutes. So, also, if he had given his first representation in any country with which a convention had been made under the International Copyright Act he would have been entitled under that Act to all the same privileges. But in no case is a person to enjoy any rights conferred by the old Acts concurrently with those created by the International Copyright Act. This is the effect of the 19th section. It might, perhaps, be thought that more strict justice would have been meted out if the excluding clause had been confined to nations with which an international convention as to copyright existed. But that is not what the Legislature has done. In effect, the statute says, that if after the passing of this Act a *British* subject or other person chooses to deprive this country of the advantage of the first publication of a new work, then he may have whatever benefits he may be entitled to under the statute (a) ; but that if he chooses to publish first in a country which has not availed itself of the privileges conferred by this Act, or if in any other case he neglects to comply with the conditions of this Act, he shall be deemed to have excluded himself from the benefits (if any) which he might otherwise have claimed.

The plain purpose of the statute is to secure for this country the benefit of the first publication of new works, and certain conditions are made without which works first published abroad are not to be entitled to copyright. These conditions have not been complied with. The Plaintiff therefore fails in his demand, and the Bill must be dismissed.

(a) 7 & 8 Vict. c. 12.

HOTTEN v. ARTHUR.

THIS was a motion for injunction.

The Plaintiff and the Defendant *Arthur* were both book-sellers. The other Defendants were printers. The Plaintiff had a collection of very old and curious books, and he had for some years been in the habit of issuing catalogues of his stock. These catalogues were not mere lists of the books and their prices, but contained in a great majority of instances short accounts of the history of the books, or notices of their contents, and anecdotes respecting them. These notices and anecdotes were, the Plaintiff declared, partly "the emanations of his own mind," and partly compilations by him from materials supplied him by others, but in all cases strictly "original matter," in the sense in which that term is used in relation to copyright.

In the beginning of this year the Plaintiff had employed the Defendants *Bowden & Co.*, to print one of these catalogues (afterwards referred to as No. 4), which was in great part a repetition of a former catalogue (referred to as No. 3) of the Plaintiff's. These catalogues were respectively intitled "A Hand-book to the Topography and Family History of *England and Wales*, being a descriptive account of 20,000 most curious and rare books, old tracts, ancient MSS., engravings, and privately printed family papers, relating to the history of almost every landed estate and old English family in the country, interspersed with nearly 2000 original anecdotes, topographical and antiquarian notes—the labour performed by *John Camden Hotten*—Mœret qui laborat. *London, John Camden Hotten, Piccadilly.*" The Defendant had also, in the course of the present year, issued a similar catalogue, which was also printed by the Defendants, *Bowden & Co.*, and was intitled "Topographica Curiosa, 1863. *Bibliotheca Anglia, Wallia, Scotia et Hibernia*: a Catalogue of an interesting collection of

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July 9th.
Copyright—
Catalogue—
Compilation.

There is copyright in a Catalogue unless it be a mere dry list of names.

And it is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it.

Where a Defendant sets up the case that his work is a fair compilation from a number of others, and not a mere copy from any one, it is of the highest importance that he should produce his original manuscript.

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books and tracts relating to the history, antiquities, topography, dialects, &c. &c., of *England* and *Wales*, with some privately printed works. Also many curious works on the early history and topography of *Ireland* and *Scotland*: the whole arranged under counties. Now on sale for cash only, by *Thomas Arthur*, 45, *Bookseller's Row, Strand, London*."

The Bill stated that the Defendant's Catalogue was in great part copied verbatim from the Plaintiff's Catalogues, or one of them, and particularly from No. 3; and that in many of the places where it had not been accurately copied, the variations were merely colourable alterations; and it charged that the Defendants *Bowden & Co.*, had made use of the MS. (of No. 4), supplied to them by the Plaintiff, for the purposes of the Defendant's Catalogue.

It was shown that in a number of instances errors committed by the Plaintiff had been copied by the Defendant; and a long list of cases in which there was the most unmistakeable resemblance between the Defendant's Catalogue and one or other of those of the Plaintiff was supplied by the Plaintiff to the Court and the Defendants.

It appeared that the Defendant's Catalogue had not been regularly published for sale, but was supplied at a nominal price to persons coming to the Defendant's shop; and it was admitted that the Defendant's object in printing it had been the sale of the books therein mentioned, not the sale of the Catalogue as a substantive work.

The Defendants, *Bowden & Co.*, declared that they had not in any manner used the Plaintiff's "copy," or the type as set up for the Plaintiff, in the preparation of the Defendant's Catalogue; that they had not now in their possession any copies of the Defendant's Catalogue; and that, as they were in the habit of selling their "waste" periodically, they did not believe they had any old proof sheets

or other papers containing any parts of the Catalogues in question or either of them. They likewise swore that the "copy" supplied to them both by Plaintiff and Defendant consisted in great part of "paste and scissors work," (*i.e.* pieces of printed paper cut out from former publications), and that they did not know from what sources the same had been derived. The prices affixed to the books in the Defendant's Catalogue were lower than those in the Plaintiff's.

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—
Statement.

Sir *Hugh Cairns*, Q.C., and Mr. *E. B. Lovell* for the Plaintiff, now moved for an injunction to restrain the Defendant *Arthur* from selling or distributing any copies of his Catalogue, or any Catalogue containing matter compiled and written by the Plaintiff, and published by him in his Catalogue.

Argument.
—

The Defendant has copied our Catalogue with the utmost minuteness, following our peculiarities of type, and even our errors.

[They were proceeding to read a number of instances of similarity, when—

Mr. *Tripp*, for the Defendant *Arthur*, objected that some of these cases were not mentioned in the lists which had been supplied.

The VICE CHANCELLOR.—That is not necessary, the Court will look at the whole of the books in evidence. The idea that only the particulars specified can be regarded (*a*) has long been exploded. The lists furnished are merely for convenience, and are in no way binding on the Plaintiff, except that I should of course take care that nothing like surprise was attempted.]

Sir *Hugh Cairns*.—Without travelling out of the lists furnished there is abundant ground for granting this injunction. They do not pretend that their notes are copied

(a) See *Mawman v. Tegg*, 2 Russ. 404.

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from old Catalogues, or that we and they derived our information from common sources.

As to the printers, they were cautioned against allowing any piracy from our Catalogue and took no precautions to prevent it.

[They referred to *Mawman v. Tegg* (a).]

Mr. Tripp and Mr. Macnaghten for the Defendant Arthur :—

There is no case where copyright in a Bookseller's Catalogue has been admitted, and it is by no means clear that the Copyright Acts extend to the protection of a mere compilation of this kind.

All the selected instances of imitation are identical in Catalogues Nos. 3 and 4, so that there is no ground for charging us with having used the MS. of No. 4, (which both we and the printers deny), and we say that No. 3 had become common property : *Saunders v. Smith* (b). Mr. Bohn does not attempt to prevent anyone from copying his *Bibliotheca Typographica*, a much more elaborate work than this, and one which is pirated, if this be piracy, every day.

There is nothing to restrain; our Catalogue is not published for sale, we only want to sell our books. These are not in fact rival Catalogues ; but *Hotten* and *Arthur* are rival booksellers, and each wishes to sell his own stock, and we are able to sell somewhat cheaper than he is. That is the real grievance, but it is not one which this Court will relieve against.

Mr. Fox Bristowe, for the Defendants *Bowden & Co.* :—

No application was made to us before Bill filed, and we have no copies of any of those Catalogues in our possession. The proceedings against us are therefore idle.

(a) 2 Russ. 385.

(b) 3 My. & Cr. 711.

There is no ground for charging us with collusion ; nothing was sent to us by either party but paste and scissors work : we could not compare the copy with all the catalogues in *London*.

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Sir *Hugh Cairns* offered to dismiss the printers from the suit without costs, which was accepted.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I cannot conceive on what principle it is supposed that there is no copyright in a Catalogue such as this. This is not a mere dry list of names, like a Postal Directory, Court Guide, or anything of that sort, which must be substantially the same by whatever number of persons issued and however independently compiled. This is a case of a bookseller who issues an account of his stock, containing short descriptions of the contents of the books, calculated to interest either the general public or the persons who may take an interest in the questions treated of by particular books. For example :—Suppose one of the books to be a History of *Cheshire* ; then he gives you a slight account of it, from which it appears that it contains a number of anecdotes respecting county families and other things of that nature ; it might well be that a person who did not previously know anything of the work, would be guided by the description and induced to purchase the work.

Judgment.

There is another point of view in which this case appears to me to be even clearer. Suppose the case of a professional writer (there may well be such), whose peculiar department it is to make out " Catalogues Raisonnées " of this kind, and to write such abstracts of the noticeable points in the various books of the Catalogue as we have here. A man who is an author for this purpose would naturally expect

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—
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that the very fact that he had printed such notes for one publisher would lead to his employment for a similar purpose by another. Suppose now this other to say to him, "I have no occasion for your services, 'paste and scissors work' will give me all I want," could it be denied that he would have a right to come here to prevent this unremunerated use of his labour.

In this case, the Plaintiff is both author and publisher ; but I do not see any reason for putting him in any worse position on that account. True, the principal value may be in the books themselves, but I cannot therefore refuse to recognise the property which this gentleman has in the product of his mental exertion ; mental exertion used for this particular purpose, and in print. So soon as these notes are printed I consider them completely protected by the Copyright Acts. It is said that the sting of this Catalogue is merely that the books are offered at cheaper prices ; that may be so, there is so much the more detriment done to the Plaintiff, and it may be that this has been the consideration which determined him to embark in litigation. Then it is said, these Catalogues are not themselves offered for sale, each bookseller is merely describing his own books with a view to their sale, and the Catalogues will by and bye be superseded by others so soon as the stock has changed ; but then the Catalogues themselves will by and bye become objects of curiosity, and will be bought for their own sakes by people who are interested in such things. Taking Mr. *Macnaghten's* own illustration, let us suppose that Dr. *Waagen*, or any one else, had published an interesting description of the paintings to be found in some private gallery, not merely giving the names of the pictures and their painters (though even that would evince some mental exertion deserving protection), but giving a slight history of, and criticism upon, each painting after the manner of this Catalogue before me, I cannot conceive that

it could be argued for a moment that the owner of the pictures would have the smallest right to copy this description.

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Judgment

This case is even stronger than the one supposed, for here the very titles of the Catalogues show that they are not mere dry lists of books—catalogues per se—but such a sketch of their history and contents as would be calculated to be of intrinsic value. It may often happen that people would want a knowledge of the history of some particular book, without caring to go any further, or to buy or read the book itself.

Again it is argued, all this matter has appeared in former catalogues, and it is impossible to reproduce such things without borrowing largely from those that have gone before. But it is clear that you cannot pirate an early edition of a work merely because a later has been published ; and that is all that this defence comes to.

The only real question is as regards the quantity of copied matter, which in this case seems to be very considerable. Now the only fair use you can make of the work of another of this kind, is where you take a number of such works: catalogues, dictionaries, digests, &c. ; and look over them all and then compile an original work of your own, founded on the information you have extracted from each and all of them ; but it is of vital importance that such new work should have no mere copying, no merely colourable alterations, no blind repetition of obvious errors. I find all these things here.

Again, it is of great importance as evidence of bona fides that the original MS. should be produced. That decided me in favour of the Defendant in the *French* dictionary case (a): I saw that he had bestowed great pains

(a) *Spiers v. Brown*, 6 W. R. 352; and see *Jarrold v. Houlston*, 3 K. & J. 708.

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and labour on his subject ; and though he had certainly copied a great deal from the Plaintiff, I was convinced that he had honestly exercised his mind upon his work. Here I think there has been wholesale piracy ; and when I find in addition that *Arthur* is underselling the Plaintiff, I think his case by no means bettered.

He says in effect to the Plaintiff, "I avail myself of your labour to show to the public that I can supply them with the same article as you do ; and inasmuch as this has not cost me any time, thought, or exertion, I can afford to supply the article on cheaper terms," thus injuring the Plaintiff by means supplied by himself.

The Plaintiff is clearly entitled to an injunction to restrain the Defendant from publishing or selling any Catalogue containing matter compiled or written by the Plaintiff or appearing in the Plaintiff's Catalogues respectively or any of them.

Feb. 23rd,
 March 12th.

Apportionment
 Act (4 & 5 Will.
 4, c. 22)—
 Shares in
 Trading Com-
 pany—Com-
 panies Clauses
 Consolidation
 Act (8 & 9 Vict.
 c. 16).

Dividends de-
 clared by joint-
 stock com-
 panies subject
 to the Com-
 panies Clauses
 Consolidation
 Act, are not
 within the Ap-
 portionment
 Act.

RE MAXWELL'S TRUSTS.

THIS was a petition under the Trustee Relief Act, the only question being as to a claim for apportionment in respect of certain dividends on the shares of joint-stock companies.

Under the will of Sir *Charles Maxwell*, his widow Lady *Maxwell* was entitled to a life interest in his personal estate. Lady *Maxwell* died on the 17th of November, 1860, and the petitioner and the respondent *William Maxwell* became entitled to the income of the estate for their respective lives.

The representatives of Lady *Maxwell* claimed an appor-

But in a company carried on under a deed of settlement and bye laws, directing that the profits should be divided half-yearly, such dividends to be paid in two specified months:—*Held*, that such dividends were apportionable under the Act with reference to the days on which they were made payable.

tioned part of **certain** dividends declared, but not received, before her death.

Upon the hearing of the petition an inquiry was directed, upon which the Chief Clerk certified that the following dividends had been made and paid in respect of shares belonging to the trust estate :—

1. £145 13s. 1d., a dividend on stock of the *London and North Western Railway Company*, declared on the 22nd of February, 1861, in respect of profits accrued for the half year ending the 31st of December, 1860, and made payable on the 26th of February, 1861, pursuant to a resolution passed at a general meeting held on the 22nd of February, 1861.

The Companies Clauses Act was applicable to this case.

2. £76 14s. 2d., a dividend on shares of the *Great Western Railway Company*, declared on the 15th of February, pursuant to a resolution passed at a general meeting held on the said 15th of February, 1861, in respect of profits accrued for the half year ending the 31st of December, 1860, and made payable on the 1st of March, 1861.

This case was governed by the *Great Western Railway Company's Act* of the 5 & 6 Geo. IV., which enacted, by sect. 118, That the first general meeting should be held within six months after the passing of the Act, and that there should be half-yearly general meetings in the second week of February and the second week of August in every year, or within twenty days next after each of such periods. And by sect. 146, That it should be lawful for the Company, and they were thereby empowered, from time to time, at any half-yearly general meeting, or at a special general meeting to be called for that purpose, to declare and make a dividend out of the clear profits of the undertaking; with a proviso that such dividends should not be made oftener than quarterly.

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RE
MAXWELL'S
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Statement.

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 —
 Statement.

3. £38, a dividend on shares of *The South Metropolitan Gas Company*, declared on the 2nd of April, 1861, for and in respect of profits accrued for the half year ending the 31st of December, 1860, pursuant to resolutions passed at a general meeting held on the said 2nd of April, 1861, and made payable on the 12th of April, 1861.

This case was governed by the Company's Act of the 5 Vict. sess. 2, c. lxxix., which, by sect. 62, enacted That the future general meetings should be held in the months of April and October in each year, and that the meetings so appointed to be held should be called ordinary meetings; and that all meetings, whether ordinary or extraordinary, should be held in *London or Southwark*. And, by sect 84, That the declaration of dividends should be exercised only at a general meeting of the Company; and, by sect. 114, That the profits divisible should not exceed £10 per cent., on an average of three years, on the paid-up capital; and that, in order to ascertain the profits, a true and particular account should be kept, and annually made up to the 31st of December, or some other convenient day in each year.

4. £21 5s., a dividend on shares in *The Alliance Life and Fire Insurance Company*, declared on the 5th of April, 1861, for and in respect of profits accrued for the half year ending the 25th of March, 1861, and made payable on the 10th of April, 1861.

The deed of settlement of the Company directed that the Board of Directors should yearly, between the 31st of December and the 25th of March, make a report of the profits of the Company; and, on the 25th of March in every year, the amount thereof (not exceeding £5 per cent. on the instalments paid up) should be divided; and the surplus (if any) above £5 per cent. might, at the discretion of the directors, be divided, or added to the capital of the Company; and every cash dividend was to be paid and payable within one calendar month of such general court.

At two extraordinary general courts of proprietors, held on the 16th of April and 14th of May, 1834, it was declared (pursuant to the powers of the deed of settlement) that the profits should thereafter be divided half yearly, such half-yearly dividends to be paid and payable in the months of April and October in each year; and further, that, as to sums divided out of profits at intervals of three, four, and five years, it should be in the absolute discretion of the directors either to pay the whole in cash, or apply the same in augmentation of the half-yearly dividend for the next ensuing period of three, four, or five years.

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—
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—
Statement.

Mr. *Amphlett*, Q.C., and Mr. *Dickinson*, for the persons interested in remainder :—

Argument.
—

The Apportionment Act (a) does not apply to these dividends. Some of the cases are governed by the provisions of the Companies Clauses Act (b), and the others are constituted on substantially the same footing in this respect—that the dividends are not sums payable at any fixed time, but at the will of the Company.

All that the Companies Clauses Act does is to empower the directors, either at an ordinary or special general meeting, to declare a dividend; and though the time of the ordinary meeting is fixed within certain limits, a special meeting may be held at any time; and it is not in any case made compulsory on the Company to declare a dividend in every year, although the accounts are directed to be made up annually. The Apportionment Act, therefore, has no application.

Again, the Apportionment Act was pointed only at cases where the income was accruing *de die in diem*, though payable only at fixed terms, as in the case of rent, dividends on the public funds, and the like. But a trading

(a) 4 & 5 Will. 4, c. 22.

(b) 8 & 9 Vict. c. 16, ss. 66, 91, 122.
S S 2

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 —
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Company is not necessarily making profits every day, and dividing them at stated periods. Properly speaking, it does not pay dividends in the ordinary sense, but divides profits; and the profits, in respect of which a particular division is made, may have accrued exclusively on the day immediately before the division; and it is quite possible, in this case, that no part of the profits divided, as to which the question arises, accrued until after the death of the tenant for life.

Mr. W. W. Cooper in the same interest.

Mr. Macnaghten for the trustees.

Mr. Rendall for the executrix of the tenant for life:—

The Apportionment Act applies. It is a mistake to suppose that its application depends on the Company being bound to declare a dividend. The only question is this: If a dividend is declared, must it be done at fixed periods? The answer is clearly in the affirmative in all these cases. The 66th and 91st section of the Companies Clauses Act are the material clauses. The 66th section fixes the time of the ordinary meetings, and the 91st directs that the powers as to declaration of dividends shall be exercised only at general meetings, which must primarily be taken to mean ordinary meetings; and this is the invariable practice of the Companies whose shares are the subject of the present discussion. It is not at all necessary that the Company should be incorporated after the passing of the Apportionment Act: *Plummer v. Whitely* (a).

The period from which the apportionment is reckoned is not the day of payment of the dividend, but the last day of the period in respect of which the dividend is declared: *Hartley v. Allen* (b); a case which is distinctly in point in our favour on the general question.

Mr. Amphlett replied.

(a) Johns. 585.

(b) 4 Jur. N. S. 500.

VICE CHANCELLOR SIR W. PAGE WOOD :—

The question involved in this petition is whether the Apportionment Act of Will. 4 applies to certain dividends or shares in Joint Stock Companies, which have become payable since the death of the tenant for life of the shares. All the shares are in companies subject to the Companies Clauses Consolidation Act, or equivalent Private Acts, with the exception of some shares in the *Alliance Insurance Company*, on which a small dividend has become payable. This last case depends on the deed of settlement of the Company, by which it was directed, that the Board should make an annual report, between December 31st and March 25th, of the profits of the Company ; and that, on March 25th, the amount thereof (not exceeding 5 per cent.) should be divided. Subsequently, a general meeting determined, under the powers of the deed, that the profits should be divided half-yearly, and be paid and payable in the months of April and October. There is therefore in this case a special provision as to the time of payment.

If the matter had been *res integra* I should have had more hesitation than I now feel in deciding that the shares of a company established for the purpose of carrying on business and dividing profits can be within the provisions of the Apportionment Act. The statute in the preamble refers to "rents, annuities, and other payments, due at fixed or stated periods," and then in the 2nd section enacts, that rents service on certain leases, "rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description made payable or coming due at fixed periods under any instrument that shall be executed after the passing of the Act, shall be apportioned" in the manner thereby directed. There seems to be room for much argument whether this applies to dividends of trading companies which in one year may have profits to divide, and none in the next. However, I find it so decided

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by Vice-Chancellor *Kindersley*, and I am prepared to act upon that view so far as the *Alliance* shares are concerned, that being a company where the dividends were directed to be made payable in April and October in every year; and still following the same case of *Hartley v. Allen*, I shall hold that the dividends on the *Alliance* shares are apportionable, with reference not to the time when the profits were earned, but to the time when the dividends were made payable, though that point also is not entirely free from difficulty; but the dividend being declared at one time and payable at another, and the Act expressly referring to the time when the payment comes due, I think the time when the dividend is payable must be taken. The objection that the profits might have been exclusively earned at some one particular part of the preceding year or half-year, as the case may be, would apply equally whether the time selected were that when the dividend is payable, when it is declared, or the last day of the period in respect of which the dividend is made. Moreover, it is to be observed that profits accruing during a current half-year would always be liable to be absorbed by some heavy loss before the time for making up the accounts arrived, and therefore it could scarcely be said that any divisible profits had been earned until the time came for making up the accounts and declaring the dividend; and the payments cannot be said to be due until the day on which they are declared to be payable. With respect, therefore, to the *Alliance* shares, I hold that the dividend is apportionable with reference to the days on which the dividends were made payable.

The other shares stand on an entirely different footing. The Companies Clauses Consolidation Act, (section 66), appoints certain months for the ordinary general meetings of the Company. In another clause, the 122nd, directions are given, that, before declaring a dividend, the directors

may set apart sums required for contingencies; and the 91st section enacts that the declaration of dividends shall take place only at a general meeting. But there is no provision that this must be at an ordinary meeting, and therefore nothing to make the dividends due or even declarable at any fixed time. It is true, that in these particular cases the dividends were declared at the ordinary meetings held at the statutory time; but this was not compulsory on the Company, whatever the ordinary practice may be. It may often happen, moreover, that a company makes no profits for some years; and though it may be admitted to be an answer on this point, that, where half-yearly divisions are expressly prescribed, as in the case of the *Alliance Company*, by bye-laws, the Company must meet and declare something, if it is only that there are no profits to divide; yet the force of that observation is lost where no such bye-laws exist; and there is therefore nothing to bring the other cases within the Apportionment Act. The principle of the Act is, that a tenant for life may be supposed to rely on the receipt of dividends at certain fixed periods; and I think it can scarcely be said that that kind of reliance is placed on the receipt of dividends so uncertain in character as those of the class which I am now considering, more especially where the tenant for life knows that there is no obligation on the Company to make these payments at any fixed periods, and that it is quite possible that they may be suspended altogether for several years. I am of opinion, therefore, that these are not payments within either the letter or the general scope of the statute.

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The hardship which was dwelt upon is not, I confess, very apparent to my mind, because it is always easy, if that is desired, to provide for apportionment by the terms of the instrument by which the shares are settled. However, it is enough to say that I can find nothing to justify me in

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holding that any of these dividends, except those of the *Alliance Company*, are within the Act as being payable at stated periods.

As each side has partially succeeded, there will be no costs, except to the trustees, whose costs must come out of the unapportioned dividends.

2 Law Rep. 89:147.

March 6th, 9th.

Insurance—Re-
 building (14
 Geo. 3, c. 78, s.
 83)—*Mandamus*.

In order to entitle an owner to the benefit of the 83rd section of the 14 Geo. 3, c. 78, he must make a distinct request to the insurance office to apply the policy money in rebuilding before they have settled with the tenant insuring; and in no case is the owner entitled to rebuild himself and claim the policy money under the said section.

Quære, whether the 83rd section is general or confined to houses within the Bills of Mortality.

Where a policy makes

the assets of a Company liable, excluding personal liability, *Semble*, that this does not give jurisdiction to a Court of Equity to interfere in the first instance to enforce the 83rd section of the said statute, and that the proper course is first to apply for a *mandamus*.

SIMPSON v. SCOTTISH UNION INSURANCE COMPANY.

THIS case came on upon demurrer. The material statements of the Bill were as follows:—

The Plaintiff was the owner in fee of a house, No. 5, *Simpson's Terrace*, in the *North Woolwich Road*, in the County of *Essex*, which he had insured in the *Royal Exchange* for £300, and had a term of 999 years in the adjoining house, No. 4. In January, 1861, the Plaintiff let the house No. 5 to *William* and *Jane Miller* as yearly tenants at a rent of £80. This house was burnt down in May, 1861, and the £300 insurance money was received, and with other monies was applied, by the Plaintiff in rebuilding the house.

During the rebuilding the Plaintiff agreed with the *Millers* that they should take both No. 4 and No. 5, at an aggregate rent of £115 from September, 1861, and should insure them for the sum of £500.

William and *Jane Miller* accordingly insured the two houses in their, or one of their, names for £200 and £300 respectively in the *Scottish Union Company*, which had an

office in the City of *London*, and informed the Plaintiff of the fact. The policy provided that the sums insured should be a charge upon the funds of the Company only, and excluded the personal liability of the shareholders.

On December 10th, 1861, the two houses were burnt down, and the Plaintiff on December 12th had an interview with the Secretary of the Defendants' Company, and ascertained the existence of the insurance for £500. The Secretary intimated, that he considered the case a suspicious one; and the Plaintiff stated that he claimed to be entitled as owner or lessor to the benefit of the policy, and to have the amount laid out towards rebuilding the houses; and that he relied upon the office paying nothing to the tenant; to which the Secretary assented.

On December 31st, 1861, the Plaintiff sent the following notice to the Secretary of the Company:—

"Sir,—As the owner of the houses No. 4 and 5, *Simpson's Terrace, North Woolwich Road*, destroyed by fire on the 10th inst., insured in your office by Mrs. *Jane Miller* or *William Miller*, or both, for £200 and £300, I hereby give you notice not to pay any money in respect of that policy to either of them or any one on their behalf, believing myself to be entitled to the benefit of that insurance, having sustained a heavy loss by the burning of these premises.

"D. C. SIMPSON."

The notice was duly received; and, after some further communication, the Secretary, in the month of January, 1863, informed the Plaintiff that they had settled with the tenant, and did not intend to pay him (the Plaintiff) any money.

Before this interview, and after the receipt of the notice, and after full notice of the claims by the Plaintiff, the Company concluded an arrangement with the *Millers*,

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by paying them a sum insured on their stock-in-trade by a separate policy; in consideration whereof the *Millers* abandoned, or professed to abandon, all their claims upon the policy for £500 upon the two houses; and delivered up this policy, in which they had no interest, to the Company, who alleged that it had been cancelled and destroyed. The sum of £500 was far less than the value of the two houses, and the Plaintiff had also effected insurances in other offices on No. 4 for £200 and on No. 5 for £400, which sums were paid to him.

The Plaintiff, on hearing that the Company had settled with his tenant, and obtained possession of the policy, proceeded to rebuild the houses in the same style, and of the same value, as before, and applied in so doing the two sums of £200 and £400, and a further sum of about £700. During the rebuilding the Plaintiff made various applications to the Defendants, the Company, "to pay over the sum of £500 to him, or otherwise to pay and apply the same in and about and towards the re-erection of the said dwelling-houses or buildings; but the Defendants refused to comply with such applications." Upon the rebuilding being completed, the Plaintiff ascertained the expenditure incurred, and his solicitors, by his direction, on the 16th December, 1861, sent the following letter to the Secretary of the Company:—

"Sir,—Referring to a letter addressed to you by our client, Mr. *D. Simpson*, under date of 31st December, 1861, we now beg to inform you that the houses Nos. 4 and 5, *Simpson's Terrace, North Woolwich Road*, which were destroyed by fire on the 10th December, 1861, have been rebuilt by Mr. *Simpson*; and we hope you are now prepared to pay over to our client the amount for which the property was insured with your office. We beg to have an answer in the course of this week.

"WADESON & MALLESON."

On the 30th December, 1862, the Secretary replied, that they had never had any insurance in the name of *D. Simpson*.

On the same day the Plaintiff's solicitors replied as follows :—

"Sir,—The question is not whether your corporation ever had any insurance on their books in the name of *D. Simpson*, but whether the houses were insured in your office. If so, Mr. *D. Simpson*, as the owner of the houses, claims under the 83rd section of 14 Geo. 3, c. 78, the benefit of such insurance, pursuant to the notice served on you on the 31st December, 1861. Will you be so obliging as to inform us whether your corporation will pay or resist payment of this claim ?

"WADESON & MALLESON."

The Company's solicitors ultimately stated that they were instructed to defend the Company against any proceedings by the Plaintiff.

In March, 1862, *William* and *Jane Miller* gave up possession and surrendered their tenancy.

The Bill prayed a declaration that the Plaintiff was entitled to require the Defendants, the Company, and the directors thereof, to lay out the said sum of £500, or a sufficient part thereof, in and about the rebuilding of the houses ; and that the Company were bound to lay out, and at the Plaintiff's request ought to have laid out, the same accordingly, pursuant to the requests and notices made and given to them ; and that the Company under the circumstances were now liable to pay the said sum to the Plaintiff in satisfaction pro tanto of the amount properly expended by the Plaintiff in rebuilding, over and above the sums of £200 and £400.

The Bill also prayed for accounts of Plaintiff's expendi-

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ture, for payment of the sum of £500, or so much as should appear to have been properly expended by the Plaintiff, as aforesaid, out of the funds of the Company applicable to the payment thereof.

To this Bill the Company demurred.

Sir *H. Cairns*, Q.C., and Mr. *Homersham Cox*, for the demurrer :—

1. The statute 14 Geo. 3, c. 78, under which the Plaintiff claims as owner, does not apply, because the property insured is in *Essex*, not within the Bills of Mortality, within which local limit the operation of the statute is confined. This Act has been almost entirely repealed by the *Metropolis Building Act*, 7 & 8 Vict. c. 74, a local Act, having to a great extent the same objects. It was itself preceded by other local statutes; and by a comparison of the whole series it is easily seen that the provisions on which the Plaintiff relies were really limited to the Bills of Mortality.

The first statute was the 19 Car. 2, c. 3, the Act for rebuilding the *City of London*. This was followed by two statutes, 6 Anne, c. 31, and 7 Anne, c. 17, containing various provisions for preventing fires within the limits of the Bills of Mortality, (though in some clauses the restrictive words are not expressly repeated,) and subsequently by a series of amending Acts, the 11th Geo. 1, c. 28, the 33rd Geo. 2, c. 30, the 4th Geo. 3, c. 14, the 6th Geo. 3, cc. 27 & 37. All these Acts were confined to the Bills of Mortality or the yet narrower limits of the *City of London*.

In 1772 a statute was passed (a) repealing and consolidating the old Acts, and also limited generally to the Bills of Mortality.

Then, in 1774, the Statute under which the Plaintiff claims, (14 Geo. 3, c. 78,) was passed.

(a) 12 Geo. 3, c. 73.

The preamble recites, that the Act of 1772 for the regulation of buildings &c. within the Bills of Mortality, and for the prevention of fire within those limits, had been found insufficient to answer the good purposes intended thereby; and that it might tend to the safety of the inhabitants and prevent inconveniences to builders and others within the said limits, if the regulations thereof were repealed and others substituted: and then the statute enacts, that all buildings within the said limits shall be divided into certain classes, and be subject to the rules thereafter contained. Then follow clauses specifying the thickness of party walls and other matters in the several classes, and making other regulations for the prevention of fire. By sect. 62, surveyors are to be appointed within the limits aforesaid, and sect. 63, relating to notices to surveyors, speaks of buildings "within the limits of this Act," instead of using the phrase "within the limits aforesaid," employed in other clauses, shewing that the whole statute, except where the contrary was expressly provided, was regarded as confined to the limits of the Bills of Mortality. It happens, however, that in several clauses which are obviously subject to the same limitation, buildings are spoken of without the addition of the words "within the limits aforesaid," or "within the limits of this Act," as in the clauses defining the several classes of buildings where the addition of the specific words became unnecessary. Some sections of the Act are however general. In *Richards v. Easto* (a), a point of pleading turned on the question, whether this Act was general or of a local and personal nature; and it was held that in its general scope the statute was local, though some clauses (for example, the 84th and 86th relating to accidental fires) were public; and in *Filliter v. Phippard* (b) the 86th clause was again held general. There the reasoning was, that the words of the clause were entirely general, and were adopted from a general provision in a former Act;

(a) 15 M. & W. 251.

(b) 11 Q. B. 347.

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but this does not bear with the same force on the section relied on here (the 83rd), because that is clearly not entirely general, being limited (as is found by reference to section 82) to insurance offices in *London* and *Westminster*; and it naturally falls, not within the class of exceptional general clauses, but within the ordinary limits of the Act. [They also cited *Vernon v. Smith* (a).]

Again, even if the Act applied, the demurrer would hold good, because the right given by the statute is to have the money laid out by the office in rebuilding; whereas the only claim made was to pay the money to the Plaintiff, who had rebuilt. The object of the Act was to prevent frauds, and for that reason it required that the rebuilding should be done by the office.

Moreover, the insurance was in the tenant's name, and could only be good to the extent of the tenant's interest. It could not cover the landlord's interest unless his interest appeared on the face of the policy, which is not alleged; and as to the tenant's interest he had power to abandon, and has abandoned, the claim, and given up the policy to be cancelled: *Saddlers' Company v. Badcock* (b).

Lastly, the remedy, if any, is at law by mandamus.

Mr. *Everitt* for the Bill :—

We are within the statute.

[The VICE-CHANCELLOR.—Is not your's a mere legal claim?]

It would be so, but for the circumstance that the policy only gives us a charge on the funds, and that throws the remedy into this Court: *Law v. Indisputable Company* (c). *Hutchinson v. Wright* (d).

(a) 5 B. & Ald. 1.

(b) 2 Atk. 554.

(c) 1 K. & J. 223.

(d) 25 Beav. 444.

As to the statute, it is clear that the 83rd section is general. The title and preamble cannot limit it; and other clauses have been held general, on the ground of the absence of the restrictive words, which applies equally to the 83rd section. It is a settled rule, that the title is no part of an Act, neither is the preamble conclusive: *Att. Gen. v. Weymouth* (a), *Mills v. Wilkins* (b), *Hughes v. Chester and Holyhead Railway Company* (c). The statute (d) which enacts that every Act of Parliament relating to *England* shall extend to *Wales* and *Berwick-on-Tweed* is an instance, that being an Act for granting certain duties.

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Here, in the 83rd clause, the words, "within the limits aforesaid," which occur in the earlier sections, are carefully omitted, although they were introduced into the corresponding clause (section 34) of the previous statute (e), which in all other respects is identical with section 83 of the late statute. A similar change is to be observed in comparing the 35th section of the former Act, which is limited, with the 84th of the later Act, which is expressly made general. The presumption is, that alterations of this kind are made advisedly: *Sturgis v. Morse* (f).

The report in *Paris v. Gilham* (g) does not specify whether the property was or was not within the Bills of Mortality, and the distinction was apparently thought immaterial. The preamble of 7 & 8 Vict. c. 84 was referred to as material; but that Act is repealed by 18 & 19 Vict. c. 122, s. 109. [He also referred to *Dalby v. India and London Assurance Company* (h), *Williams on Personal Property*, second edition, p. 146, where an error as to

(a) Amb. 19.

(b) 6 Mod. 62.

(c) 1 Dr. & Sm. 524.

(d) 20 Geo. 2, c. 42.

(e) 12 Geo. 3, c. 73.

(f) 28 Beav. 398; s. c. on app.

2 De G. F. & J. 223.

(g) G. Coop. Ch. Cases, 56.

(h) 24 L. J., C. P., 2.

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Vernon v. Smith is corrected, and to the statute 14 Geo. 3, c. 48.]

As to the form of our claim, we allege sufficient verbal notice before the rebuilding. With respect to the remedy by mandamus the nature of our right is such as to require equitable assistance to enforce a charge.

As to the alleged want of interest, the statute treats the policy as annexed to the house, and covering the whole value of it, for the benefit of the person entitled thereto.

Sir *H. Cairns* in reply :—

The 82nd section of the statute is clearly limited, and the limitation evidently runs on to the 83rd. It would be absurd to suppose, that, if the office must be local, there is no limit as to the property insured.

Then there was no claim on the office to rebuild ; and it is consistent with the Bill that *Miller* had no interest, and gave up the policy to be cancelled.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The questions raised in the argument on this demurrer are of considerable importance, and I regret to be compelled to decide the case upon a narrow ground. But it appears to me clear, that, upon the facts as stated in this Bill, the demurrer must be allowed. Assuming the section of the statute on which the Plaintiff relies not to be confined to buildings within the limits of the Bills of Mortality, there are certain conditions, which any person claiming the benefit of the enactment must satisfy. The statute provides, that, on the request of the owner, the office in which

a house is insured shall apply the policy-money in restoring the house. The owner, therefore, to entitle himself to relief, must show that he made a distinct request to the office so to lay out the money, and that they refused or neglected to do so. The averments in the Bill do not seem to me to amount to an allegation of such a request.

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The way in which the case is put, apparently in accordance with the facts, is this. It is averred that there was an agreement with the tenants that they should insure, and that they did insure in their own names; that when the fire had taken place the Plaintiff went to see the secretary of the Insurance Office, and claimed to be entitled to the benefit of the policy, and to have the amount applied towards rebuilding the houses, and said that he relied on the office paying nothing to the tenants; to which the Secretary assented. There was no reference, on this occasion, to the statute; and it is certainly a very weak averment of a request to have the money applied under the terms of this Act of Parliament. It seems to amount to no more than a demand that the money should be paid to him or for his benefit, and not to his tenants. But this conversation was followed by a formal notice on the 31st of December, 1861; and that notice is simply a notice not to pay the tenants, the reference evidently being to the agreement to insure. That is not a request to the Company such as the Act requires, but a claim to be entitled to have the policy-money paid to him, or for his benefit, and not to the tenants. Nothing more took place before the Company came to a settlement with the tenant, who abandoned the house-policy on being paid the insurance on his goods. Then come averments of further communications with the Secretary, in which the money is claimed, and still no reference made to the statute. Throughout, the Plaintiff is not requesting the Company to lay out the money in the manner prescribed by the Act of Parliament, but claiming to be the person really interested

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under the policy. Now, I apprehend that is not the case at which the enactment points (supposing it to be applicable without reference to locality). I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year. Then the statute gives the landlord the right to require the money insured by his tenant's policy to be laid out in rebuilding. But I think it is too clear for argument, that if the owner does not make this request before a settlement with the tenant, he cannot insist upon it afterwards. I cannot tell to what extent the claim on the goods-policy may not have been questionable, or what the consideration for the surrender of the house-policy amounted to. All that can be said is, that the person who was *prima facie* entitled to the money, thought it worth while to abandon it on certain terms. If that was done, as I must take it to have been done, before any such request as the statute requires, and without fraud, (which is not averred,) it is impossible to say that the Plaintiff's right could survive. On this ground, therefore. I must hold that the Bill cannot be sustained, and it is not probable that the facts would allow of any useful amendment.

Another objection presents itself, which it would be still more difficult to meet by any amendment. Supposing that it could be averred that a formal request was made in due time, there remains this difficulty :—The Act of Parliament points to a request of this kind in order that the Company may cause the money to be laid out in rebuilding, and I think it clear that they could not pay the money to the owner. The object of the provision is, in the interest of the public, to prevent persons from fraudulently setting fire to their houses, and this is a fraud which of course might be committed either by the owner or the tenant. The Company themselves are the persons to rebuild, in order that

they may see that the money is really laid out in reinstating the property, and that it is judiciously expended. It is quite true in this case that the value of the house is stated to have been in excess of the insurance; but that does not affect the policy of the Act, which does not in any case give the owner the right to rebuild and claim the money, but requires the work to be done by the Company. If this were otherwise, the purpose of the Act might be defeated by a landlord taking the policy-money when there was a covenant by the tenant to rebuild.

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I come now to another branch of the argument, whether mandamus would not be the proper remedy, if any. It is settled, that, where an entirely new right is given by statute, mandamus is the remedy, though it is otherwise where an old right only is enforced. It was on this principle that the Court declined to interfere in *Weale v. West Middlesex Waterworks* (a). Unless the principle of *Law v. The Indisputable Company* entitles him to come into this Court, the Plaintiff, if right at all, ought clearly to have proceeded by mandamus; and I am inclined to think that the right course would have been to establish the case by mandamus, and then, if any difficulty occurred in obtaining payment, to come here to enforce it against the assets of the Company.

Without, therefore, deciding the question whether the 63rd section of the statute is general or local, I must allow the demurrer on these grounds—First, that there is no sufficient averment of a request pursuant to the statute; and, secondly, because an owner cannot in any case, by virtue of this statute, rebuild the premises himself, and demand the money from the office; to which I may add, that, according to my present impression, the application should have been made, in the first instance, to the Queen's Bench. I shall not, however, refuse leave to amend.

(a) 1 Jac. & W. 358.

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Will—Con-
struction—"To
be begotten."

Devise to *A.* and
her daughter *B.*
for their lives,
remainder to all
the children of
A. and *B.*, to be
begotten, as ten-
ants in common
in tail.

B. being the
only daughter
of *A.*—Held that
B. was entitled
in common with
her own chil-
dren to share in
the remainder
in tail.

*Early v. Ben-
bow* (2 Col. 342)
distinguished.

ALMACK v. HORN.

SPECIAL Case.—*Henry Pocock* made his will, dated 15th of May, 1787, as follows:—"I devise all my real estates unto and equally between my daughter *Mary Harriet*, widow, and my granddaughter *Anna Maria Harriet*, for and during the term of their respective natural lives. And from and after the decease of either of them, I give and devise the moiety of her so dying unto the survivor of them for the term of her natural life; and, from and after the decease of the survivor of them, I give and devise all my said real estates unto and to the use of all and every the child and children of my said daughter and granddaughter, lawfully to be begotten, equally to be divided between them, if more than one as tenants in common and not as joint tenants, and the several and respective heirs of the bodies of all and every such child and children lawfully issuing; and, in case one or more such children shall happen to die without issue of his or her or their body or bodies, then I give and devise the part or share of him, her, or them so dying without issue unto and to the use of the survivors or survivor of them, and the heirs of the body or bodies of such survivors or survivor lawfully issuing, such survivors to take as tenants in common and not as joint tenants; and if there shall be but one such child, or if all of them but one shall die without issue, then I give and devise the whole of my said real estates unto and to the use of such one child, and the heirs of his or her body lawfully issuing. And for default of such issue, I give and devise all my said real estates unto and equally between my two nephews *Henry Pocock* and *John Pocock*, and my two nieces *Ann Pocock* and *Ann Palmer*, and my niece *Mary Hooper*, and their several and respective heirs and assigns for ever as tenants in common and not as joint tenants." And the

testator bequeathed his personal estate upon trust to invest in freehold lands in fee simple, to be settled to the uses before declared of the real estates, and in the meantime to be invested, and the income applied in like manner as the rents of the estates if purchased would go.

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Anna Maria Harriet had three children, and was herself the only child of *Mary Harriet*; and the main question submitted was, whether *Anna Maria Harriet* was entitled to share in the remainder after her own and her mother's life interests together with her own three children. There was also a question whether the personalty could be invested in gavelkind land.

Mr. Caldecott for the children of *Anna Maria Harriet* :—

Argument.

The limitation of the personalty upon trusts referring to the disposition of the real estate gives the Court jurisdiction upon the whole construction.

The property is divisible into thirds and not into fourths. It is true, that the words "to be begotten" are ordinarily read as including children already born; but this is only when there are no circumstances to show an intention to exclude existing children. Here there are such circumstances. *Anna Maria* was the only child of *Mary Harriet*, and could not be meant to share with her own children, the testator having first given her an estate for life. Moreover, the rule as to including children already born applies only to persons claiming by descent, and not where they take by purchase, or at any rate only in the absence of intention to use the words in their grammatical sense. This was certainly the origin of the rule: *Hibblethwaite v. Cartwright* (a), *Hewet v. Ireland* (b), *Wilkinson v. Adam* (c).

(a) Cas. t. Talb. 31. (b) 1 P. Wms. 426. (c) 1 V. & B. 422. ;

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 —
Argument.

In *Early v. Benbow*(a), a much stronger case than the present, these words were read in a future sense, and the whole scope of the will shows that the granddaughter was not meant to share with her own children. [He also cited *Pickup's Trusts*(b).]

Mr. Jolliffe, for a person claiming under one of the children, supported the same view.

Mr. Dickinson for persons interested under *Anna Maria Harriet* :—

The division must be in fourths. If the life estate were given to a stranger there would be no doubt that "to be begotten" must be read as equivalent to "begotten or to be begotten." The rule that 'procreandis' is equivalent to 'procreatis' is laid down by *Coke*, and is not disputed; but it is said that it applies only to cases of descent. No doubt the earliest cases were of that description, but the rule has since been applied to all cases without distinction: *Lomas v. Holmden*(c), *Cook v. Cook*(d), and *Doe v. Hallett*(e), all support this view.

The only peculiarity relied on to distinguish this case is the limitation for life to *Anna Maria Harriet*, and the sole authority for departing from the settled rule under any circumstances is *Early v. Benbow*. But that was very different from the present case, the Vice-Chancellor considering that there was an obvious intention not to give double legacies, which compelled him to adopt the unusual construction of the words. He, therefore, substituted the popular for the legal construction of the phrase,

Where a gift is to A. for life, remainder to next of kin or relations, A., if he is one of them, is allowed to take as a

(a) 2 Coll. 342.

(b) 1 J. & H. 389.

(c) 1 Ves. Sen. 290.

(d) 2 Vern. 545.

(e) 1 M. & S. 124.

relation or one of the next of kin : *Pearce v. Vincent* (a), *Elmsley v. Young* (b). This is exactly parallel to the present disposition.

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Mr. Caldecott in reply.—The next of kin cases only come to this, that a testator selects one object of bounty, and gives him an estate for life, and dies intestate as to the rest of his estate. Besides, there you could only exclude the tenant for life by giving a non-natural sense to the words “next of kin,” while here it is the natural sense that we contend for.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

March 9th.
Judgment.

This special case raises a question on the construction of the will of *Henry Pocock*, whether, under a devise to testator's daughter and granddaughter for their lives, with remainder to all the children of his said daughter and granddaughter lawfully to be begotten, as tenants in common, the granddaughter is entitled to share together with her own children. The point arises, not upon the devise itself, which passes the legal estate, but upon a gift, by reference, of the personal estate, which renders it necessary to put a construction upon the devise.

Now, there is no doubt about the strict legal sense of the words “to be begotten;” but the question is, how far that sense can be controlled by the language of the will, coupled with the actual circumstances of the family. The facts stated are—that there was no other child of the daughter than the one to whom a life estate was given, and it was contended, that, upon the principle of *Early v. Benbow*, this circumstance was sufficient to justify me in departing from the strict legal construction, and reading the words “to be begotten” in their future

(a) 2 My. & K. 800.

(b) 2 My. & K. 780.

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 ———
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sense. In *Early v. Benbow* the word was "born" and not "begotten," which is perhaps rather stronger in favor of including all. Originally, the rule by which the words "to be begotten" were extended to include existing children, was introduced to prevent confusion in descents, as Lord Talbot observes in *Hebblethwaite v. Cartwright*; but it is clear that the rule was afterwards extended to the case of children taking by purchase.

The correct way of stating it is, not to say that a non-natural sense is given to the future words, but that the apparently future expression is read as having no reference to time at all, but as a mode of pointing out the stirps by way of description. Accordingly, it became settled law that procreatis and procreandis were equivalent expressions. *Doe v. Hallett* is perhaps a stronger case than any other, because there was a special proviso in which the words "hereafter to be born," which point clearly to time, were employed, and yet the Court held that the strict legal construction must prevail. In several of the authorities it is said (as it may be in every case) that you must look to the surrounding circumstances and the limitations of the will. In *Early v. Benbow* legacies of £600 each were given to certain named children of testator's brother Henry, and legacies of £500 each to named children of one of Henry's daughters. This was followed by a gift of £500 to each child "that may be born" to either of the children of either of testator's brothers lawfully begotten. The named legatees did not exhaust the whole class of brother's grandchildren, and the Vice-Chancellor was of opinion that the testator, having made such provision for the named grandchildren, could not have intended to introduce the same persons again into the general class so as to give them double legacies. I think very few minds would fail to follow the reasoning of that judgment; but the case before me is very different.

Nothing is more mischievous than to depart from the settled legal meaning of words, unless there is something in the instrument which absolutely requires that you should do so. The only peculiarity in this will is the gift of a life estate, followed by a sweeping clause carrying the property subject to the life estate to a class of which (according to strict legal construction) the tenant for life would be a member together with her own children. But though peculiar there is nothing in this disposition so extravagant and absurd as to compel one to reject the legal construction of the words. It involves no inconsistency to say, that the devisee shall take the whole for life, and that after her death her children shall be let in to share the fee with her. I think that decisions, where, under a gift to one for life and then to the next of kin, the tenant for life has been admitted to share as one of the next of kin, have a very strong bearing on this question. The distinction, that in the next of kin cases the natural sense of the words is followed, while to admit the tenant for life here would be to give a non-natural sense to words importing futurity, is open to this answer, that the sense said to be non-natural has always been held by all courts to be the proper and natural construction. It might be added, as a further distinction between this case and *Early v. Benbow*, that this is a gift of realty, and that the Court always leans to early vesting. The construction which would exclude the tenant for life might keep the vesting in suspense for a longer period. Even the singularity of the arrangement, that a mother should take with her own children, loses some of its weight, when it is observed, that on any view the uncles and aunts were to share in common with their nephews and nieces. I think it would be very unsafe upon a will such as this to depart from the legal construction of the words, and I shall therefore, following *Doe v. Hallett*, decide that the tenant for life is entitled to share with her children. The answer to the case will be, that, according to the true construction of the

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will, the personal estate ought to be laid out in land of common socage tenure; and that in the events that have happened, on the death of the testator's granddaughter *Anna Maria Harriet*, such lands, when purchased, would become divisible into fourths between the granddaughter or her heirs and her three children, as tenants in common in tail.

1864.

WATERHOUSE v. WILKINSON.

Jan. 11th, 19th.

Practice—
 Opening Bid-
 dings—Sale by
 sealed Tenders.

Where, after an unsuccessful sale by auction the Chief Clerk arranged, that, in lieu of a second auction, sealed tenders might be sent in:—Held, that this was a sale within the rules as to opening biddings, and the biddings opened accordingly on the offer of a large advance.

THIS was an administration suit, in which an order had been made for the sale of certain property, being an undivided moiety of No. 1, St. Paul's Church Yard.

The property had previously been valued by a surveyor appointed by the Court at £8000, and it was put up for sale by auction on 29th July, 1863, but only £3800 was offered, and the property was bought in.

An offer to purchase for £4200 was then made by *J. K. Farlow*, and subsequently an offer at £4350 was made by the Plaintiff. Further offers were then made on both parts, the highest being one by *Farlow* for £4600.

The Chief Clerk, thereupon, in order that the Chambers might not be converted into an auction mart, directed that sealed tenders should be sent in, which he would open on the 15th December. This was done, and it was found that the Plaintiff's offer was £4820, and that of *Farlow* only £4801; and the Chief Clerk made an entry of the facts, and that the purchase by the Plaintiff was confirmed.

The Plaintiff then took out a summons to confirm the contract; but *Farlow* having since offered £5300, the persons interested claimed to have the biddings opened. This summons was adjourned into Court. *Farlow* was not served.

Sir *H. Cairns*, Q.C., and Mr. *C. Walker*, for the Plaintiff :—

This is not a sale by auction, but by private contract, like *Millican v. Vanderplank* (a), before your Honour, and the practice as to opening biddings does not apply. The sale, therefore, ought to be confirmed.

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Argument.

Mr. *Rolt*, Q.C., and Mr. *Bagshawe*, for the beneficiaries under the will.—Except in form, this was essentially a sale by auction, and the practice is settled by *Osborne v. Foreman* (b) (affirmed under the name *Barlow v. Osborne* (c), where under similar circumstances it was held that there had been no confirmation in any sense to prevent the opening of the biddings.

Mr. *Lushington* for the trustees :—

Sir *H. Cairns* in reply.—*Osborne v. Foreman* was a case of public competition by tender, this a private sale to one of two competitors.

The practice of opening biddings was introduced when the Court used to sell without reserve, and ought to have been discontinued (and certainly should not be extended) now that the practice is to fix a reserved bidding.

The case stood over to obtain the Chief Clerk's statement of what had taken place.

Jan. 19th.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This case comes from Chambers on the question, whether a purchaser, under circumstances which I will describe, of property ordered to be sold in the suit, can be deprived of his purchase, and the biddings opened in consequence of what has since occurred.

The property, which was an undivided moiety, was put

(a) 11 Hare, 136. (b) 8 D. M. & G. 122. (c) 6 H. L. Cas. 556.

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—
Judgment.

up for sale by auction, but was not sold. It had been valued before the auction at £8000. Two persons, and only two, appear to have been anxious to obtain the property, and they alone competed at the auction, but did not offer so much as the reserved bidding. After the failure of the auction, the Chief Clerk thinking it not desirable to have a competition in Chambers in the nature of an auction by successive offers from these two gentlemen, proposed that they should send in sealed tenders. These were sent in and opened, and the Chief Clerk declared that the Plaintiff had made the higher offer; and the question is, whether that declaration constitutes this gentleman the purchaser conclusively, so as to oust the ordinary practice with reference to the opening of biddings upon a higher price being offered before a sale is finally confirmed. It appears that the Chief Clerk never treated this proceeding by sealed tenders as anything else than an auction under a more convenient form. There is no entry in his book to say that the highest bidder was to have the purchase absolutely. After the tenders were opened, an entry was made, that the Plaintiff was the highest bidder, and that his purchase was confirmed; but it is obvious that it could not, in fact, be confirmed in any absolute sense, because that would require a previous certificate, upon which the mode of proceeding would be that explained in *Barlow v. Osborne*, by the House of Lords. The result of that decision is, that there has been no change in the general rule as to the necessity of confirmation and the duty of the Court to open the biddings, though by reason of the Masters Abolition Act there is some alteration in the form of confirmation. The sole question is, whether this case falls within the principle of my decision in *Millican v. Vanderplank*—a decision which was not disapproved in *Osborne v. Foreman*—where I held, that, on a sale by private contract, when the Master had once approved of a sale, the ordinary practice as to opening biddings had no application.

I cannot find any substantial distinction between this case and *Barlow v. Osborne*. The only peculiarity is, that the bidders were limited to two. The use of the word "confirmed" by the Chief Clerk clearly does not affect the case; for the only effect I can give to that word is to treat the entry as exactly equivalent to an auctioneer knocking down the property to a particular bidder.

An advance of £480 has since been offered; and, holding the general practice to apply, I think I am concluded by the authorities. The case must go back to Chambers with this expression of my opinion. Therefore, upon the costs being paid, and *Farlow* becoming bound and paying his purchase money on a day to be named, there will be no order on this application.

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v.
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Judgment.

RE NATAL & CO. COMPANY LIMITED).

THIS was a Petition for a winding-up order. It appeared that the Company had been but lately established, that it consisted of but nine shareholders in all, and that it had been almost at once unsuccessful. The only debt mentioned in the Petition was a sum due in respect of certain property which was expected to prove of less value than the debt, but the anticipated deficiency had, by arrangement, been taken upon themselves by such of the shareholders as were *sui juris*.

1863.
Nov. 21st.
Winding-up—
Companies Act,
1862—Prac-
tices.
The provisions
of the Com-
panies Act,
1862, as to
winding-up
orders under the
Court of Chan-
cery, are not in-
tended to apply
to cases where
there is a very
small body of
shareholders,
and no difficul-
ties in the way
of voluntary
winding-up
exist.

Mr. *Phear*, for the Petitioner, asked for a winding-up order.

Mr. *Heath*, for two other shareholders, consented.

Mr. *James*, Q.C., and Mr. *Terrell*, for three other shareholders, opposed:—

There is nothing to be done: the only debt due has been

Argument.

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RE NATAL,
&C., COMPANY
(LIMITED).

Argument.

arranged, and the Company can be perfectly well wound up out of Court.

Mr. *Phear*, in reply.—There are but nine shareholders in all; I and my friend Mr. *Heath* represent four out of the nine, and are anxious for this order; Mr. *James* represents three who oppose, two are silent. It is no matter that we are not unanimous: the Company must be wound up, and its debts ascertained and paid. True, the respondents have sworn that they believe there are none, but that cannot be proved till the result of winding-up is known.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The Act, under the provisions of which it is sought to obtain this order, is a very beneficial Act where there are numerous parties concerned, because, in such a case, it is almost impossible properly to adjust and enforce their mutual rights without the interposition of this Court, and then the machinery provided by this Act enables the Court to interfere in the most advantageous manner practicable; but it never was intended to be turned into a mere machine for causing costs, which is the only effect which I can attribute to this Petition.

This Company barely comes within the terms of the Act. It being necessary to fix some minor limit to the number of persons who might combine to form a Joint Stock Company as distinguished from an ordinary partnership, that limit was fixed at seven; and this Company consists of nine shareholders merely. It is said that some of them are not competent to act without the direction of the Court, but seven of them have no difficulty in acting as they please; and this being a Joint Stock Company, they have full power to bind the remaining two.

Then I do not find it suggested that there is any debt due from the Company except the engagement which the

two respondents have been duly authorised to arrange, and which they have in fact arranged by agreeing to sell the property, and make the seven gentlemen who are sui juris responsible for the balance according to their shares; and there is not a hint that any person has any ground for complaint with reference to this arrangement, or is, under the circumstances, exposed to any danger which the proceedings under this Petition could lessen or obviate. Some stress has been laid upon the number of shareholders who have consented; but I find that one of them says he is surprised by the Petition, and that when asked for his signature he was told it was a matter of form.

I dismiss this Petition with costs.

DETTMAR v. METROPOLITAN AND PROVINCIAL
BANK (LIMITED).

THIS was a Bill seeking to make the Defendants, the *Metropolitan and Provincial Bank (Limited)*, responsible for a breach of trust committed by the Defendant *George Long Cobden*, under the following circumstances:—

Sir *George Carroll*, by his will dated 6th of April, 1859, bequeathed his residuary estate to his widow, *Lady Carroll*, and his friend *Joseph Maynard*, upon the usual trusts for sale, conversion, and investment thereof, and upon trust (amongst other things) to invest £10,000 in manner therein mentioned, and to pay the income arising therefrom to his son-in-law, Mr. *Cobden*, (who died in November, 1859) for life, with remainder upon trust for such of his children as being sons should attain twenty-one, or being daughters should attain that age or marry; with the usual maintenance clause; and he directed his said trustees to set apart position of the parties, places the proceeds of a promissory note, which has been made in their favour by *A.* (a person just come of age,) unreservedly in the power of *B.* (a person who stands in loco parentis to *A.*) knowing at the time that *B.* claims to be a creditor of *A.* to a large amount for necessities supplied, and *B.* afterwards misappropriates the money, the bank will be restrained from suing on the note.

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RE NATAL,
&C., COMPANY
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Judgment.

Dec. 16th, 18th.

Promissory Note
— *Onus of*
Proof—Trust
and Trustees.

Notwithstanding the general rule, that the onus is on the maker of a negotiable instrument to show that it has been paid, the holder is bound, in the first place (unless he be a derivative indorsee for value during the currency of the bill or note) to show that the maker received value for it.

When a bank, with knowledge

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as many sums of £2000 each as there should be children of the said Mr. *Cobden* living at his (the testator's) death, and to pay the income arising therefrom for the maintenance of such children respectively, and to hold the capital upon trusts similar to those of the £10,000. And, after certain other legacies, the testator bequeathed his residuary estate to Lady *Carroll* for life, with remainder upon trusts for the benefit of the children of the said Mr. *Cobden*, similar to those of the £10,000.

The said Mr. *Cobden* had six children, namely ; *Katherine* (a Plaintiff), who attained twenty-one on the 4th of May, 1861; *Louisa* (a Plaintiff), who attained twenty-one on the 17th of May, 1862; *George*, *Halsted*, *Frank*, and *Emma*, who are all still infants. On attaining twenty-one the Plaintiffs *Katherine* and *Louisa* also became entitled in possession to certain other funds not material to be specified. The Plaintiff *Mortimer Dettmar* was not interested in the suit otherwise than as being now the husband of the Plaintiff *Louisa*, and throughout the following statement the expression "the Plaintiffs" refers only to the Plaintiffs *Katherine Cobden* and *Louisa Dettmar*.

On the 10th of November, 1861, a suit of *Cobden v. Maynard* was instituted by the Defendant *George Long Cobden* (the uncle of the Plaintiffs,) as next friend of his brother's children, for the purpose of having the trusts of Sir *George Carroll's* will carried into execution. A decree was made in the suit on the 8th of Nov. 1862.

By orders made in the cause of *Cobden v. Maynard* the Defendant *Cobden* was appointed guardian of the infants, Plaintiffs in that suit, and an allowance was made him for their maintenance.

Lady *Carroll* died in September, 1862. In the course of the month of October, 1862, the Plaintiffs signed a

guarantee to indemnify the estate against the consequences of an advance of £250 to their brother *George*, which was thereupon advanced to him by order of the Court.

On the 3rd of November, 1862, two indentures of settlement were executed. One of these deeds was made between the Plaintiff *Katherine* of the one part, and the Defendant *Cobden* of the other part; and thereby she vested all her property and interest in the funds aforesaid in *Cobden* as sole trustee thereof, upon trust for herself for life for her separate use without power of anticipation, with remainder to her children as she should appoint, and in default of appointment equally; and, in case she should have no children, then upon trusts framed to exclude from all interest therein any husband whom she might marry; and, after a number of the ordinary management clauses, the settlement in question vested a power of appointment of new and additional trustees in the Defendant *Cobden* and his heirs, and (after his death) in the surviving or continuing trustees or trustee "for the time being" thereof; and it was provided that such appointment should be considered necessary if the Plaintiff *Katherine*, whether covert or sole, should in writing require it to be made. The deed then provided that it should be lawful for the Defendant *Cobden*, or other the trustees for the time being, "if he or they shall, in their uncontrolled discretion, think fit," upon any treaty for the marriage of the Defendant *Katherine*, and with her consent in writing, to resettle the property; and it was, lastly, declared that it should be lawful for the Plaintiff *Katherine*, with the consent of the trustees or trustee for the time being, at any time after she should have attained the age of twenty-five years, to revoke or vary any of the trusts aforesaid.

This settlement was revoked on the 20th of April, 1863, in pursuance of the last-mentioned power.

The other settlement was in precisely the same terms,
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only substituting the name of the Plaintiff *Louisa* for that of the Plaintiff *Katherine*.

There was some conflict of evidence as to what took place when these deeds were executed, the Plaintiffs saying that the Defendant *Cobden* had represented to them that the Lord Chancellor required them to execute some deeds relating to their property, and that they had signed them on that representation without further investigation. Messrs. *Mason, Sturt, & Mason*, however, who had prepared the deeds, proved that they had been duly read over and explained to the Plaintiffs at the time, and that they had then at least fully understood their effect.

Early in the month of November, 1862, the Defendant *Cobden* took a furnished house at *Brighton* for the use of the Plaintiffs and their brother and sister, and the family continued to reside there until Mrs. *Dettmar's* marriage.

It appeared that all the necessary funds for keeping up this establishment were in fact supplied by *Cobden* in dribbles as required; and he stated, but there was no satisfactory evidence on the point, that the moneys so supplied by him largely exceeded the allowance for maintenance which had been made to him.

The Defendant *Cobden* was one of the directors of the Defendant *The Metropolitan &c. Bank*, and some time in December, 1862, he called on Mr. *Burton*, the manager of the Bank, and had an interview with him. The account of this interview given by the Bank was as follows:—*Cobden* stated that his nieces were entitled to a large sum of money under Sir *George Carroll's* will, and wished to anticipate the payment of the legacies; that they had no ready money; that he had to support them, and had spent about £1500 for them already, and could not afford to spend any more; that they had a large establishment at *Brighton* to keep up, and five or six in family to maintain; and that they had expensive tastes, knowing that they

would soon be possessed of something like £100,000. *Cobden* then asked *Burton* whether, under these circumstances, the Bank would entertain a proposal for a loan of £3000 or £4000 to his nieces? *Burton* replied, that he could not himself entertain such a proposal, and that it was matter for a solicitor. *Cobden* then suggested that the solicitor for his nieces should see the solicitors of the Bank on the subject; to which *Burton* assented, and the interview terminated.

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The business of the Bank was managed by a committee, consisting of *Burton* and two directors in rotation, and called "The Rota Committee." On the same day, and shortly after this interview with *Cobden*, *Burton* mentioned the matter to the Rota Committee, and the committee agreed to make the required advance "if the solicitors of the Bank should make a favourable report as to the property to which the ladies were entitled, and if *Cobden* would, as well as his nieces, make himself responsible for the money if advanced."

On the 29th of December, 1862, the solicitors of the Bank received the following letter from Messrs. *Mason & Co.*, *Cobden's* solicitors, and who were also solicitors for the Plaintiffs in the suit of *Cobden v. Maynard*—

"7, Gresham Street, 29th Dec. 1862.

"Messrs. *Davidson, Bradbury, & Hardwick*.

"Dear Sirs.—Some clients of ours are about to borrow £4000 from the *Metropolitan & Provincial Bank*, and we shall be glad to see you on the subject. When can we do so? It would be convenient if you could appoint to be here, as you could then see our clients' proposed security, as we propose to have a mere equitable charge at first in the shape of an agreement for a mortgage, the money being, as we are instructed, required to-morrow. Yours, truly,

"MASON, STURT, & MASON."

In consequence of this letter, Mr. *Carr*, of the firm of
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Davidson & Co., called the next day on Messrs. *Mason & Co.*, and was informed of the principal facts above stated, and the proceedings in *Cobden v. Maynard*; and the settlements referred to were produced to and inspected by him.

On the same day Messrs. *Davidson & Co.* wrote to Mr. *Maynard* the following letter:—

“30th Dec. 1862.

“Dear Sir.—Our clients *The Metropolitan & Provincial Bank* propose to open a credit to-day in favour of the Misses *Katherine E.* and *Louisa A. Cobden*, taking as security a charge on the shares of those ladies under the will of the late Sir *George Carroll*, Knight, of which we understand you are the surviving trustee. Will you have the goodness to inform us by the bearer if you are aware of any incumbrance created by the ladies, or either of them, on the shares or hereditaments in question.

“We are, dear Sir, yours faithfully,

“DAVIDSON & CO.”

In reply to this letter, Mr. *Maynard* informed them of the existence of the aforesaid voluntary settlements.

On the same 30th December, Messrs. *Mason & Co.* wrote and sent the following letter to Messrs. *Davidson & Co.*

“Dear Sirs.—*Cobden's Loan*.—We have an appointment, to explain to Mr. *Burton* how we arrive at the estimated value of the security, for two o'clock, at the *Metropolitan Bank*. Will you please to inform him of the result of your investigation at once, or to meet us there, as we shall require the papers. Yours, truly,

“MASON, STURT & MASON.”

On the same day a meeting for the said purpose took place between the Defendant *Cobden* and Mr. *Burton* and Mr. *Carr*, on the part of the *Bank*, and Mr. *Mason* on the part of the Plaintiffs. No other person was present. It took place in the manager's private room, and lasted about half an hour.

The account of this meeting contained in the answer of the Bank was to the following effect :—

Burton said, that there were two points to be ascertained—1st, whether *Cobden's* nieces were really entitled to the money; and, secondly, whether they would have the money within a reasonable time, as it would not suit the Bank's purpose to lend the money for more than three or four months. *Mason* said, that the Bank would have ample security, as the young ladies were entitled to at least £20,000 a piece; and *Carr* expressed himself satisfied on this point. *Burton* asked "specially and pointedly" when they would be likely to have any of the money? and *Mason* said, he thought they would be able within three months to obtain payment of a part of the fund in Court. *Burton* then said, that, "after this explanation and assurance, he should have no hesitation in proposing a loan to the said Mr. *Cobden's* said nieces of £3,000 or £4,000 for the sanction of the Rota Committee on next day." Nothing was said as to the purposes for which the loan was required, except that *Cobden* stated generally that he had made advances for the maintenance of his nieces and their brothers and sisters, and that the object of the proposed loan was to find ready money for their maintenance and personal use, and for the purposes of their estate, pending the suit of *Cobden v. Maynard*.

On the next day another meeting took place in the board-room of the Bank. There was considerable conflict of testimony as to what then took place; but, as his Honour eventually determined entirely to disregard the evidence of the Plaintiffs, it will be sufficient to state the account of such interview given by *Burton* and relied on by the Bank.

Mr. *Burton's* account of the matter was as follows :—

"On the 31st day of December, 1862, the said *George Long Cobden* and the Plaintiffs (with another young lady, who was, as I believe, their younger sister,) called at the

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Banking House, No. 75, *Cornhill*, aforesaid, of the said Bank, and they were shewn into the board-room there; I joined them there; and the said Mr. *Cobden* introduced the ladies to me; and, after a little conversation, he asked me if the note was ready for signature, meaning the note to be given for the said loan; I said—No: I did not know for what amount to prepare the note, as £3000 or £4000 had been talked of for the amount of the said loan; and the Defendant *Cobden* said, ‘We had better make it £4000, as we do not think £3000 will be sufficient.’ He then addressed a remark to one of the ladies, which I did not catch; and I then said, ‘As long as we have their signatures for the amount, it does not matter to the Bank; we are as ready to make it £4000 as £3000, as we consider the security ample.’ I then sent a messenger at the said Bank for a stamp on which to write the note; I also sent for the signature book, in which the signatures of customers of the said Bank are entered; this was brought to me by Mr. *Williams*, one of the clerks of the said Bank; and the two elder of the three young ladies” [that is to say the Plaintiffs, the third being a little girl of six or seven years of age,] “signed their names in the said signature book. The said Mr. *Cobden* asked me how I proposed to carry out the transaction, and whether I should give a loan on the note; I said that I should discount it, charging the discount at once. This took place in the interval after I had sent for the said stamp and before it was brought to me. The said stamp was then brought to me by the said messenger; I filled up the stamped paper brought me as a joint and several promissory note, dated the 31st of December, 1862, for the sum of £4000, payable three months after date to the said Bank. It is not customary for bankers to rediscount or part with bills or notes discounted by them before maturity; and in the present case there was no intention of so parting with the said note; and similar notes taken by bankers are frequently taken payable to them, without being made payable to order, or otherwise negotiable; when

I had filled up the said note for signature as aforesaid, the said Mr. *Cobden* then took it up and read it aloud to the Plaintiffs in my presence. They appeared to clearly understand it. The Plaintiffs then, in my presence, signed the said promissory note, and the said Mr. *Cobden* in my presence endorsed it. The said Mr. *Cobden* said to me, that he should like his nieces to open accounts in their own names for their own private purposes with the Bank; and this was assented to. After the said note had been signed as aforesaid, I said, addressing the Plaintiffs *Louisa* and *Katherine*, 'How shall we arrange about this advance, to whose account shall the money be placed?' My difficulty was that I had their joint and several promissory note and separate accounts. I asked them further and particularly, if all the moneys to which they were entitled belonging to the said estate (meaning the estate of the said Sir *George Carroll*), would necessarily pass through Mr. *Cobden's* hands, as he was trustee for them; and, on being informed by all parties that this would be so, I said, 'Then, if so, this sum may as well go to Mr. *Cobden's* account also,' or to that effect; and I suggested that the net proceeds, less discount, of the said promissory note, should be placed to an account to be opened by Mr. *Cobden* for that special purpose; and that, to distinguish it, it should be called *George Cobden's Trust Account*. The Plaintiffs *Louisa* and *Katherine* heard me say this, and I addressed myself to them:—they appeared perfectly to understand and approve of the proposal, and assented to it. The said Mr. *Cobden* then asked the said Plaintiffs how much they would require for themselves, and asked whether he should give £500 or £250: ultimately it was agreed that £250 would be sufficient; and cheque-books were given to the said two Plaintiffs and to the said Mr. *Cobden*, for the said two Plaintiffs' separate accounts and for the said Mr. *Cobden's* trust account respectively. During this interview I left the said board-room and went into my own room for a minute or two, and then returned to the board-room.

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During this interview the said Mr. *Cobden* and the said two Plaintiffs and myself (except while I was temporarily absent) were seated at the board-room table, the said two Plaintiffs sat at one end, I sat next to them at one side, and the said Mr. *Cobden* sat beyond me on the same side of the table, so that I sat between the said two Plaintiffs and the said Mr. *Cobden*. The interview lasted, to the best of my recollection, about a quarter of an hour; the said two Plaintiffs appeared to me, and as I believe did, fully comprehend the transaction and approve of it; and from the time when the first suggestion of the said loan was made to me until the signature as aforesaid of the said promissory note, and the full amount of the proceeds thereof was advanced by the said Bank thereon, nothing occurred which was calculated to raise, or which did raise, any suspicion or apprehension in my mind as to the said loan being proposed or made otherwise than with the full sanction and approval of the said two Plaintiffs: on the contrary, the circumstances which, as I was informed, rendered the said loan desirable, and the purposes for which the said loan was, as I was informed, to be applied, appeared to me sufficiently to explain why the said two Plaintiffs were raising money as aforesaid; and I was confirmed in this view by the fact that the said loan was approved of by the Defendant *Cobden*, who, as I was informed, and as the fact is, was then the trustee of the said two Plaintiffs, and by their solicitor Mr. *Frederick Mason*. I understood and believed, and still believe, that the said two Plaintiffs, with the consent of the Defendant *Cobden*, could, at the time when the said note was signed, dispose of the proceeds of the said note absolutely, as they thought fit."

In pursuance of this arrangement, the said note was immediately discounted by the Bank, and the proceeds (£3949 : 0 : 10) were carried to the credit of the said "George *Cobden's* Trust Account;" and *Cobden* thereupon drew two cheques against this account for £250 each, and carried over the said two sums to the credit of the two

other accounts then opened in the names of the Plaintiffs respectively.

Between the 31st December, 1862, and the 13th February, 1863, *Cobden* drew out the whole of the money standing to the credit of the said "Trust Account": some small sums were afterwards paid in by him to the credit of this account; but on the 13th April, 1863, this account was finally closed, by the application of the balance (£41 : 15 : 10) then standing to the credit thereof towards the payment of the said promissory note, then overdue. It was admitted that no part of the said sum of £3949 : 0 : 10, except the said two sums of £250 each, had ever been, in fact, applied for the benefit of the Plaintiffs, and that a sum of £275, further part of the said sum, had been expended for the benefit of the Plaintiffs' younger brother, *George E. Cobden*, and that all the rest of the money had been appropriated by the Defendant *George Long Cobden*.

The following is a copy of the *George Cobden's* Trust Account:—

Dr. 1863.			1863.		
Jan. 2	Miss Cobden	250 0 0	Jan. 1	Balance	3949 0 10
"	L. A. Cobden	250 0 0	Feb. 16	Cash	150 0 0
"	G. Cobden	1000 0 0	20	"	800 0 0
3	G. E. Cobden	250 0 0			
5	G. Cobden	1000 0 0			
"	G. E. Cobden	800 0 0			
15	Bill Stamp	2 0 0			
29	Cheque Book	0 5 0			
Feb. 2	6	25 0 0			
4	7	260 0 0			
13	Bearer	130 0 0			
27	8	300 0 0			
Mar. 4	9	550 0 0			
28	Bearer	40 0 0			
Apr 13	To overdue Bill	41 15 10			
		£4899 0 10			£4899 0 10

George Cobden kept two other accounts with the Bank—one his private account, and the other in the name of *George Cobden & Co.*: it appeared that the private account was

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overdrawn on the 27th of January, 1863, and again on the 1st April, 1863; and on the 11th April, 1863, this account was closed by the appropriation of the balance (£711) to the payment of the said promissory note.

It further appeared, that the sum of £1000, drawn by *Cobden* from the trust account on the 2nd January, had been paid in to the account of *George Cobden & Co.*, and that the sum of £150 paid in to the credit of the trust account on February 16th had been transferred from *Cobden & Co's* account. Nothing appeared to show what had become of any of the other sums drawn from the trust account. On the 6th April, 1863, the account of *G. Cobden & Co.* was closed, and a sum of £40, part of the balance at foot thereof was applied towards the payment of the promissory note; and the remainder of such balance (amounting to £2 : 18 : 10) was transferred to the credit of *George Cobden's* private account.

On the 17th February, 1863, the Plaintiffs *Mortimer* and *Louisa Dettmar* were married. The articles made in contemplation of this marriage recited the said voluntary settlement, and practically confirmed the same.

Prior to this marriage, and during the negotiations which took place in contemplation thereof, the Plaintiff *Mortimer Dettmar* learned, for the first time, that the Plaintiff *Louisa* was under some liabilities to the Bank. This led to enquiries on his part; in answer to which Mr. *Parkin* (his solicitor) received from Mr. *Mason* a letter, dated 5th February, containing the following passage:—"About the end of December Miss *L. Cobden* joined with her sister and Mr. *Cobden* in giving security to the Bank for £4000 advanced, £500 of which was placed to the account of Miss *L. Cobden*, with a view to her being able to draw upon it from time to time for her immediate requirements."

In consequence of this letter, Mr. *Parkin*, on the 11th of February, called at the Bank, armed with the following letter:—

"10th February, 1863.

"Sir.—I will thank you to furnish the bearer of this note, Mr. *Parkin*, of *Lincoln's Inn*, with the particulars of any balance to my credit in your hands, and also to inform him if I am under any and what liability to the Bank.

"I remain, Sir, your obedient servant,

"LOUISA A. COBDEN."

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Mr. *Parkin* then saw Mr. *Burton*, who informed him of the existence of the loan in question, and that they had lent the money on *Cobden's* introduction, and had carried it to the credit of a special "trust account" in *Cobden's* name.

There was some conflict of evidence as to what passed on this occasion; but it appeared that Mr. *Burton* described pretty fully the circumstances under which the money had been advanced, and that Mr. *Parkin* left the office without expressing any intention of disputing the validity of the promissory note. At this time there was a sum of £111 : 15 : 10 standing to the credit of the trust account; but the payments afterwards made by *Cobden* to the credit of that account raised it so that from Feb. 20th to 27th the balance was as high as £931 : 15 : 10, all of which was afterwards drawn out as before stated. Had the Bank on the 11th of February, refused to let *Cobden* draw out any more, and had he, notwithstanding such refusal, paid in the sums which he did in fact pay in, there would have been left £1061 : 15 : 10 to the credit of the said account.

On the 2nd of April, 1863, the promissory note fell due, and was dishonoured.

It was alleged that *Cobden* had, at the time when the question was first raised as between the *Dettmars* and the Bank, offered to take all the responsibility on himself. On the 7th of April, 1863, *Cobden* resigned his position as director of the Bank; and, on the 23rd of April, he executed an assignment for the benefit of his creditors.

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Some negotiations afterwards took place between the Bank and the Plaintiffs with reference to the payment of the said note : and the Plaintiffs offered to pay the two sums of £250 each, which they had actually received ; but they refused to pay the sum due upon the note.

On the 17th of April, 1863, the Bank commenced an action on the note ; and, on the 2nd of May, 1863, this Bill was filed, to restrain the action, and to have it declared, that, except as to any money actually paid to or drawn out by the Plaintiffs, the note was invalid as against the Plaintiffs, and to have the note delivered up to be cancelled.

A motion for injunction to restrain the action was made on the 6th of May, 1863, which stood over by arrangement until the 23rd of July, and was then turned into a motion for decree, and the cause now came on to be heard on such motion.

Dec. 16th.

Argument.

Sir *Hugh Cairns*, Q.C., Mr. *Giffard*, Q.C., and Mr. *Osborne Morgan*, for the Plaintiffs :—

The Bank had full notice that this was trust money, and yet they deliberately put it in the trustee's power to make away with the whole of it. That is sufficient to fix them with liability : *Archer v. Hudson* (a), *Maitland v. Irving* (b), *Maitland v. Backhouse* (c).

It is ridiculous to suppose that these young ladies understood what was meant by discounting notes, and opening trust accounts ; if the money had been produced in Bank of *England* notes and handed over to Mr. *Cobden* to put into his pocket, they would probably have understood that ; and what really happened had precisely the same effect, though it was so disguised as to prevent them from perceiving it.

(a) 7 Beav. 551.

(b) 15 Sim. 437.

(c) 16 Sim. 58.

The fiduciary position of *Cobden* is undoubted: though not technically guardian, as the ladies were of age, he was practically so; and the transactions with reference to the trust settlements show how unbounded was his influence over them.

[They also referred to *Bodenham v. Hoskyns (a)*, *Pannell v. Hurley (b)*, *Bridgman v. Gill (c)*.]

Sir *Roundell Palmer*, Attorney-General, Mr. *Thomas Chambers*, Common Serjeant, and Mr. *A. G. Marten*, for the Bank:—

The burden of proof, when a promissory note has been discounted for value, is on those who seek to impeach the transaction; and they are bound to show that it has been obtained by fraud.

The Bank are surely not in a worse position because the nearest relation and trustee of the young ladies was present at the making of the note, nor yet because the Plaintiffs were represented by solicitors of their own in the matter.

There are three questions in the case:—1st. As regards the circumstances attending the original making of the note. 2nd. As regards the manner in which the proceeds were applied at the time. 3rd. The subsequent negotiations.

Your Honour will look at the case as it was seen by the Bank on the 31st of December, 1862, and not in the light of *Cobden's* subsequent defalcation.

At that time the voluntary settlements (which were very proper settlements for the purpose of preserving those young ladies from fortune-hunters) were in existence; and therefore *Cobden's* was the proper hand to receive the

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(a) 2 D. M. G. 903.

(b) 2 Coll. 241.

(c) 24 Beav. 302.

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moneys. The only persons the Bank could consult were *Cobden*, *Mason*, and *Maynard*, and these were all consulted.

No sort of reliance can be placed on the evidence of these young ladies; and removing their testimony, we have *Burton's* positive and uncontradicted oath that they understood all that was done, and assented.

At any rate, they are concluded by the negotiation between *Parkin* and the Bank. The notice to *Parkin*, that not more than £500 had been carried to the account of Miss *Louisa Cobden*, was notice of all the facts relevant. At that time the Bank had it in their power to indemnify themselves in great measure; but the Plaintiffs, relying on the solvency of *Cobden*, lay by and permitted us to go on trusting *Cobden* with this money; they cannot therefore now complain. Besides, only one of those sums is ear-marked, and no presumption arises, as against us, that sums drawn generally against this account were wrongly drawn. This case is the reverse of *Maitland v. Backhouse*. The cases cited by the Plaintiffs do not apply: *Archer v. Hudson* (a) was a case of suretyship; in *Pannell v. Hurley* and *Bodenham v. Hoskins* the money was applied to overdrawn accounts: and the Bank could not suppose that there was any other application of the money intended; that was not the case here: this case is more like *Blackie v. Clark* (b), where the Master of the Rolls refused to set aside the annuities complained of.

Keane v. Robarts (c) shews, that if there had been a proper application presumable, we are not responsible.

[They also referred to *Countess de Front's case* (d).]

A reply was not heard.

(a) 7 Beav. 581.

(b) 15 Beav. 595.

(c) 4 Madd. 332.

(d) 6 D. M. G. 801.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I am clear that this transaction cannot stand. These young ladies were completely under the control of their uncle, one of them had only just attained twenty-one, the other had done so very recently, and there is no ground whatever for supposing that Mr. *Cobden's* influence had at all diminished. It is not material to consider what was the exact relation which he bore to them : it is clear that he was regarded as their guardian, though not technically so : he had acted as if he stood to them in loco parentis, and he was the guardian of their younger brothers and sister : he undertook to arrange, and did practically arrange everything with the Bank, and the Bank throughout treated him as a principal. The ages of these ladies must have been known to *Burton*, and *Cobden* expressly told him that the money was wanted to reimburse him (*Cobden*) for his expenses about their maintenance, &c., and it was suggested that the money should be carried at once to his account on this ground. Then comes the difficulty : the Bank says that the signatures of the ladies were obtained to the promissory note on the introduction of *Cobden*, and then relies upon the rule which throws upon the maker of a negotiable instrument the onus of shewing that the note has been paid : that is so *prima facie*, but then, if there is any question as to the consideration, the onus is upon the holder of the note (not being a derivative indorsee for value) to show that value was given to the makers ; but in this case these ladies never received one farthing except the £500, which they have offered and are willing to pay. The Bank says, that the money was paid to their order and by their direction ; but I am not satisfied that that was so ; no officer of the Bank went to them for any order and direction to pay to *Cobden* ; and *Cobden*, who did in fact give this direction, was bound to protect them.

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I have then two points to consider:—1st, Was this application of the money authorised? And, 2ndly, Have the Plaintiffs lost the benefit of the objection by subsequent laches?

Mr. *Marten* says that there were but three persons to whom the Bank could have applied—Mr. *Maynard*, the trustee of Sir *George Carroll's* will, Mr. *Mason*, the solicitor of the ladies, and *Cobden* himself. But *Cobden* is unfortunately the only one of the three to whom they applied on the most material point of the whole case, the payment of the money to *Cobden* himself: on this point neither of the others was consulted at all. The application to *Maynard* was a mere inquiry whether there were any liabilities affecting the fund; and, if this had been a suit to set aside a mortgage effected by these ladies, it might have been treated as a notice to him as trustee that they were dealing with the property; but the letter is this [His Honour read it; see p. 646]. No reason is given to *Maynard* which would draw his attention to what was going to be done; he is merely told that credit is about to be given to the ladies, and he is asked whether there is anything to make the security bad.

Then as to *Mason*; so far from being consulted in this matter, he was at the moment making a totally different arrangement; and he never knew of the proposal that a note should be given till after everything had been done; still less of the intention of handing over to *Cobden* the whole of the proceeds: he must be taken to have known that it was intended to make an advance, but nothing of the application thereof.

It is important to see how this unfortunate transaction took place. I think so far there is no reason to say that *Burton* was a party to fraud of any kind; and in this the case differs very favourably from *Archer v. Hudson*, and *Maitland v. Backhouse*: but can I treat these ladies as

liable on his note when no value was given for it except to *Cobden*? *Cobden* tells us the way in which the idea of a loan first arose. [His Honour read the account, *supra*, p. 644.] Now, this is wholly inconsistent with the notion that *Mr. Burton* would give us; this is a scheme from the first to get the whole to *Cobden's* account. *Cobden* says, "from the first I intended to repay myself my advance," and you can see that there was clearly in his mind an intention to make himself master of this fund. There was a great deal of conversation between *Cobden* and *Burton* before the loan, and some suspicion of this may have reached *Burton*.

I acquit this gentleman of [all personal fraud, but I cannot quite disconnect him from the scheme which was so clearly in *Cobden's* mind.

Cobden applied to *Burton*, telling him this story: [His Honour read *Cobden's* statement *supra*, p. 644.] And this account is substantially identical with that given by *Burton*, on which the case of the Defendants must stand or fall. I must notice here the observation of the *Attorney-General*, that the Bank had then no reason for distrusting *Cobden*. That is, no doubt, just; but one cannot help observing that this was a matter of the greatest delicacy: the Bank were informed that these ladies wished to have an advance in anticipation of their legacies; it does not appear that it was suggested that the £1500 was to be paid to *Cobden*; did *Burton* suppose that the whole £4000 was to be spent in house-keeping for the family? This should have induced a great deal of consideration before any one was entrusted with the disposal of so large a sum on their behalf.

The directors agreed to make the advance on certain terms. [His Honour read them, *supra*, p. 645.] Then, on the 30th of December, came the interview between *Carr* and *Mason*, as solicitors of the respective parties.

This brings me to consider the settlements executed by

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these ladies. They are very strange instruments. The evidence of *Mason* on this point would lead to the idea that *Cobden* had been meditating a fraud of some kind in relation to this property for a long time. The property is large, and is vested in a single trustee, although it was at the time under the protection of this Court, and although *Mason* must have known that this Court never has allowed property to be entrusted to any one man except at the express desire of the cestui que trust. If there had been an independent solicitor concerned, that would have altered the case; but, though I do not mean to attribute any fault to *Mason* except carelessness, I cannot consider him, being as he was *Cobden's* solicitor, to have been sufficiently independent for this purpose. I think this should have made *Carr* look very closely and cautiously into the matter; but, on the other hand, I must observe that neither *Carr* nor *Mason* seem ever to have thought that *Cobden* was to have this money.

I now come to the interview at which these ladies were present. It seems to have been very short—*Burton* says, not more than a quarter of an hour. I quite agree that no reliance can be placed upon the statements of the ladies; but I find it admitted that they had no preparation for this interview, further than that *Cobden* says he told them that he was to have the money, and to give it to them as they wanted it. I gather, however, that they did understand that they were to have a loan; but I do not find anything to lead me to believe that they understood the exact effect of what took place. I consider it the duty of those who deal with persons in the position in which these ladies were placed, to see that they fully understand the whole transaction, particularly in a case where the money was not to be paid to them, but to some one else for their benefit.

In this case I find the bulk of the conversation was between *Cobden* and *Burton*; and the position in which the

parties sat was not such that these ladies could readily hear such conversation. [His Honour read *Burton's* evidence on this point, *supra*, p. 650]. I assume, however, that they understood that they were to become liable to pay the Bank £4000. It may be that this was an excuse for *Burton's* conduct ; but it certainly does not constitute a legal defence for the Bank.

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Why did he not act as he would have done in the case of any other customer? Why did he not ask whether he should open a joint account, or two several accounts, or an account payable on their joint cheques alone? There would have been nothing extraordinary or unusual in any of these courses, and any of them would have sufficiently met what *Burton* says was his difficulty.

The Bank have to prove that value was received ; and they prove it in this way : " We paid some one else by the authority of our debtor ;" it then remains for them to prove the authority ; if they can show a valid direction to pay as they have paid, well and good ; but I think that no order was ever given sufficient for this purpose. True, the ladies assented to the course proposed by *Burton* ; but the onus is still on the Bank to show that they knew what that course amounted to ; (the case is very different from that of a payment to executors who are the legal hands to receive the money :) they must show that those ladies were content to place this large sum in the hands of

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Judgment.

Cobden. They should have seen *Mason* or *Maynard*, and asked them whether they should hand over all this money to the very person who had introduced the customers to them? no solicitor would have ever advised them to do so without the most distinct authority from the ladies.

Although the circumstances differ in some respects from those of *Archer v. Hudson* and *Maitland v. Backhouse*, still, in the view of this Court, the Bank, being fully aware in the course of the transaction that the uncle was taking on himself the position of guardian and parent, were bound to see that the ladies fully and distinctly understood what he was causing them to do.

There only remains the question of laches: if there never was any debt on the part of these ladies this question does not arise. The only ground on which it becomes material to consider the subsequent occurrences is, that this transaction was capable of confirmation: and the fact of such confirmation might be presumed from delay amounting to laches. But in this case I find that no one had any information on the subject till Feb. 4th, by which time all the money had been drawn out; and then there comes *Mason's* letter; and then, the matter being in dispute, the parties have a right to a reasonable time to obtain advice, and to discover the exact state of the facts. True, there were added some other inducements to delay, family reasons and matters of that nature; but I do not think that their existence weakens the Plaintiffs' right. I do not give any weight to the alleged offer by *Cobden*; and I do not think that anything turns on the first interview between *Parkin* and the Bank; that was merely a general inquiry: and I have nothing more than this, that other and private feelings were mixed up with proper deliberation before entering into litigation.

*Minutes of
 Decree.*

DECLARE, that the Plaintiffs are not liable on the promissory

note in the pleadings mentioned, except for such sums of money as they or either of them actually received; and the Plaintiffs consenting to pay such sums, and also the sum of £250 received by or on account of their brother *George Edward Cobden*—

DECREES perpetual injunction to restrain the Bank from suing on the note, and order the Defendants to pay the costs of the suit.

1863.

DETTMAR
v.
METROPOLITAN & PROVINCIAL BANK
(LIMITED).

PAGET v. HUISH.

THIS was a special case upon the construction of the will and codicil of *Francis Hart*. By the will, dated the 27th of June, 1857, the testator, after making a specific bequest of furniture to his trustees, to retain so much as they should think fit for the benefit of his grandson, and to sell the rest, the proceeds to form part of the residuary personal estate; and after giving various legacies, which he directed to be paid out of his personal estate, proceeded thus:—"I give and devise the following annuities," specifying five annuities, and directed as follows:—"And I declare that each of the said five annuities shall be paid by the trustees of this my will out of the rents of my real estate hereby devised half-yearly, and the first payment thereof shall be due and be made at the end of six calendar months from my decease. And I give the said five annuities free of legacy duty, which I direct to be paid out of the rents of my real estate." And the testator devised and bequeathed to his trustees all his real estate, and also all the rest, residue, and remainder of his personal estate, not thereinbefore specifically bequeathed, upon the following trusts:—"In trust, with and out of the rents and income of my said real estates, to pay the said several annuities hereby devised or given, and subject thereto upon trust to pay to or otherwise permit my grandson, *C. F. Fellows*, to receive the rents, dividends, interest, and annual income of

April 30th,
May 4th.

Will—Annuity
—Specific or
demonstrative.

Gift by will of annuities followed by a declaration that they should be paid by the trustees out of the rents of real estate thereby devised. Gift of all real and residuary personal estate on trust, out of the rents of the realty, to pay the annuities, and subject thereto to apply the real and residuary personal estate on certain trusts. Held,—that the bequest of the annuities was demonstrative; and that, the rents having proved insufficient, the annuities were payable out of the residuary personal estate.

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—
Statement.

all and singular the said real and residuary personal estates, respectively," during his life; and after his decease to stand possessed of "the said real and residuary personal estates respectively," in trust for the children of *C. F. Fellows*, who being sons should attain twenty-one, or being daughters attain that age or be married, and for the issue of sons dying under twenty-one, with gifts over. And the testator directed, that, until his said grandson, or, in the event of his death under twenty-one, until his children, being sons, should respectively attain twenty-one, or die leaving issue, or being daughters should attain twenty-one or be married, "the rents, dividends, interest, and yearly income of the several real and personal estates hereby respectively devised and bequeathed, and of the stocks, funds, and securities whereon or wherein the same personal estate shall be invested, shall be accumulated by my said trustees in the way of compound interest," so as not to exceed the period allowed by law; and all such accumulations were to follow the trusts of the estates and effects from which the same should arise.

By a codicil, dated the 9th of July, 1857, the testator, "in addition to the legacies and annuities bequeathed to them or some of them" by the will, gave annuities to some of the former annuitants and others, to be payable during the minority of the grandson or his children surviving him, or until the vesting of the gift over; and directed as follows:—"And it is my will and desire that the several annuities hereby given and devised shall be a charge upon and he paid out of the rents of my messuages and tenements, lands, hereditaments, and other real estates by my said will devised, in the same manner in all respects as the annuities by my said will given and devised; and that the trustees of my said will for the time being do and shall, with and out of the rents of the same hereditaments and real estates, and before making any other payments thereout except the annuities by my said will given and

devised, pay the said annuities hereby given and devised when and as from time to time due during the continuance thereof respectively . . . And I give all the said annuities hereby devised free of legacy duty, it being my will that the legacy or annuity duty payable on the said annuities hereby given, and also on the annuities given by my will, shall be paid out of the rents of my real estate."

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v.
HUTCH.
Statements.

By a second codicil, dated the 7th of July, 1858, the testator recited that he had sold certain mortgaged premises for less than the mortgage debt, which he had settled on his daughter, and that he was desirous of making up the deficiency, and bequeathed the amount thereof to the trustees of his daughter's settlement, and directed that the legacy duty on the said bequest should be paid out of his residuary personal estate.

The testator died in March, 1862. The total amount of the annuities given was £930 per annum, of which £270 per annum lapsed. At the date of the will the testator's real estate produced only £550 per annum, and a part having been sold in October, 1857, the annual value at testator's death was only £480.

The testator left large personal estate. The questions submitted were :—

1. Whether the deficiency of the rents for payment of the annuities was to be made good out of the income or capital of the residuary personal estate.

2. Whether the same was to be made good out of the corpus of the devised real estate.

Mr. Robinson for the Plaintiffs, the trustees of the will.

Argument.

Mr. Kay (Sir H. Cairns, Q.C., with him), for the annuitants :—

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Argument.

1. The personal estate is liable to make good the annuities if the real estate is deficient.

In the first instance, there is an express gift of the annuities, which in itself charges the personal estate—then follows a demonstration of the rents of the real estate as the primary fund, but nothing to discharge the personalty. The direction as to legacy duty carries out the same scheme, and then the gift of the real and residuary personal estate is subject to the annuities. The direction in the first codicil shows that the testator considered he had charged the real estate with the annuities, but not that he had discharged the personalty. And the facts as to the value of the property show how improbable it was that the testator supposed that the rents would suffice for the annuities: *Mann v. Copland* (a), *Fream v. Dowling* (b), *Hancoz v. Abbey* (c).

2. If the personalty is not liable, at any rate the corpus of the realty is; for the payment is to be out of the rents for all time, and the gift of the realty is subject to the payment of the annuities: *Allan v. Backhouse* (d).

Mr. *Giffard*, Q.C., and Mr. *Field*, for the residuary devisees and legatees:—

The will contains a trust for accumulation, and it is therefore quite clear that the testator contemplated that some rents would be payable to the devisees; and it is to be observed, that the accumulation is not directed to be resorted to to make good the annuities. There is a very recent case which I ought to mention, *Phillips v. Guttridge* (e), where the Lord Chancellor held that annuities were to come out of corpus; but there the will was differently

(a) 2 Madd. 223.

(b) 20 Beav. 624.

(c) 11 Ves. 179.

(d) 2 V. & B. 65.

(e) 11 W. R. 12.

framed, and I may observe that *Stelfox v. Sugden* (a) was not cited, and that no general rule is laid down that a charge on rents necessarily implies a charge on corpus.

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Argument.

The annuities given by the codicil are limited to the minorities; and it is clear that all the annuities are meant to stand on the same footing. Therefore, in effect, it is a gift out of the rents and profits during minority. *Stelfox v. Sugden* is a clear authority against holding this to be a charge on the corpus.

The exoneration of the personalty may be inferred: *Boots v. Blundell* (b), *Dickin v. Edwards* (c), *Gordon v. Duff* (d), *Williams v. Hughes* (e), *Coard v. Holderness* (f).

There is here a clear contemplation of a surplus, and that is conclusive.

Mr. Kay, in reply.—The accumulation clause has no bearing in proving that an immediate surplus was contemplated, because it may have been introduced to provide for the case of the annuities dropping below the amount of the rents. Besides, it applies not to the rents only, but to the income of realty and personalty together. The surplus contemplated is not a surplus of real income, as in *Stelfox v. Sugden* (a), but of the combined income. *Phillips v. Gutteridge* is very strong in my favour on the question of payment out of corpus; but, independently of that point, I rely upon the original gift, and the absence of anything to discharge the personalty.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

May 4th.
Judgment.

The question on this special case is one which very fre-

(a) Johns. 234.

(e) 24 Id. 474.

(b) 19 Ves. 495.

(f) 22 Id. 391.

(c) 4 Hare, 273.

(d) 28 Beav. 519.

1863.
 PACER
 v.
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 Judgment.

quently arises, whether certain annuities are given only out of particular property, or whether, though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question, whether the annuities are payable out of corpus or only out of income.

As to the first point, the authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will.

The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts.

Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it.

The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable.

It is not necessary to dwell on the first class of legacies, which are familiar enough. The specific class of legacies, where the gift is held to be a gift of a particular portion of certain specified property, is illustrated by many decisions. In *Dickin v. Edwards* (a) Vice-Chancellor *Wigram* points out these distinctions very clearly, referring to an early case of *Savile v. Blakel* (b), where the principle is stated very much to the same effect. An example of a demon-

(a) 4 Hare, 273.

(b) 1 P. Wms. 778.

strative legacy is found in *Mann v. Copland* (a). There two sources were pointed out from which an annuity was to be paid: first, out of certain real estate, and, failing that, out of a sum of stock. Both funds failed, and it was held that the annuity, though primarily charged on the particular funds, was demonstrative and not specific, and was therefore to be made good out of the personal estate.

The point in all these cases is, to ascertain whether the testator has merely pointed out a particular fund which he desires to have applied in paying the legacy, or whether the legacy itself is given only as a portion of the specified fund.

In *Dickin v. Edwards* the form of the gift was this: There was first a charge of £1000 to be raised by sale of timber on a particular estate, without any previous mention of a gift. Then this £1000 was bequeathed, so that the thing given owed its existence to the charge. It was not a bequest of a sum equivalent to the charge, but a gift in terms of so much of the estate as constituted that charge.

The whole class of cases to which I refer was commented on at some length by Lord Cottenham in *Creed v. Creed* (b). This was an appeal upon which the House of Lords reversed a decision of Lord St. Leonards, which was itself a reversal of a judgment of Lord Plunket. The gift was in this form: a gift of "an annuity or yearly rent-charge of £1000 charged upon and to be issuing and payable out of" all testator's real estates except a particular estate previously devised, followed by other annuities given in the same way. Then what happened was this: The other legacies, which in case of deficiency of the personal estate were charged on the realty, exhausted the personal estate; and the question was, whether the annuities were entitled to any priority over the legacies as against the real estate. Of course, if the

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PAGET
v.
HUIBH.
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(a) 2 Madd. 223.

(b) 11 Cl. & Fin. 491

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 PAGET
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 Judgment.

annuities were to be regarded as specific gifts of so much land as would produce the annuities, they could not be affected by the charge of legacies ; but Lord *St. Leonards* held that the annuities were not of this specific character, and that the legacies and annuities were payable *pari passu*. This decision was reversed in the House of Lords, and Lord *Cottenham* (a) comments at some length upon the whole class of cases. He says, "There are but two modes by which the annuities and legacies can be put upon the same footing : first, by considering the annuities as general bequests, and not as specific gifts of interest in the lands ; or, secondly, by considering the legacies as specific gifts of interest in the lands. As to the first, gifts of annuities were formerly treated as specific ; but when Sir *Joseph Jekyll*, in *Rogers v. Millicent*, decided that a direction to lay out money in the purchase of an annuity was only a pecuniary legacy, it was thought impossible to maintain the distinction, and all simple gifts of annuities were held to be pecuniary legacies. Such is the statement of Lord *Hardwicke* in *Lewin v. Lewin*. This rule, however, has no application to the gift of a rent-charge or annuity issuing out of land, for that is an interest in the land itself, and necessarily specific. The very case occurred in *Long v. Short*." Then Lord *Cottenham* mentions other cases, and distinguishes *Mann v. Copland*, on the ground that in that case there was considered to be a distinct intent to give the legacy, the particular property out of which it was to come being a secondary thought. Then he refers to *Fowler v. Willoughby* (b) and other cases of demonstrative legacies, where the legacy, "though charged upon a particular fund, does not fail by failure of the fund ;" but all these, he adds, "proceed upon the construction showing a general intent."

(a) 11 Cl. & F. 508.

(b) 2 S. & S. 354.

These are, therefore, the three classes of gifts : First, a general gift, in which no special fund is pointed at for payment ; secondly, a specific gift out of a particular fund alone ; and, thirdly, a gift where a particular fund is pointed out as primarily applicable, but where the gift is not to fail by the failure of the particular fund. In this case I think there is a clear intention that the gift should take effect in any event, because, after bequeathing several legacies, the testator proceeds thus : " I give and devise the following annuities," specifying them, and then adds a declaration that these annuities shall be paid by the trustees out of the rents of the real estate thereby devised. Subsequently, there is a gift to the trustees of all the real estate and the residuary personal estate, upon trust, out of the rents of the realty to pay the annuities, and subject thereto to apply the real and residuary personal estate upon certain specified trusts.

All this appears to me only to show that the testator, after making a positive gift, points out the particular fund which he desires to have first applied, and which he supposes to be adequate for the purpose. It is clear that he preferred that the gift should be satisfied out of the realty rather than the personalty ; but the question now is, whether he preferred that it should fail altogether rather than be thrown upon the personalty. I think the case is very similar to *Mann v. Copland*, and that there is no indication of an intention that the gift was to fail on failure of the real estate.

The codicil does not, in my opinion, at all assist the contrary contention, but exactly accords with what appears to me to be the construction of the will ; for the testator says that, " in addition to the legacies and annuities bequeathed by the will," he gives further annuities and makes them a charge upon and directs payment out of the rents of the real estate.

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Judgment.

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HUISE.

Judgment.

I think, therefore, I must hold that the case is governed by *Mann v. Copland* and that class of authorities, all of which I may observe are collected in Mr. *Hawkins'* able Treatise on the Construction of Wills. The deficiency must accordingly be made good out of the residuary personal estate.

Post-692.

1862.

Dec. 11th, 12th.

Joint Stock

Company—

Amalgamation

—Ultra Vires

—Confirmation

by General

Meeting.

A Life and Fire Assurance Company purchased the business, and undertook the liabilities of a Life Assurance Company, the purchase being confirmed by special general meetings of both Companies, and subsequently acted upon.

The deed of the purchasing Company empowered a general meeting to authorise any act requiring the sanction of such meeting, and to determine on any

question relating to the affairs of the Company which should arise in the course of the conduct or management thereof. It also empowered the directors, where the deed was silent, to act in the direction of the concerns of the Company, as at their absolute direction they should think most conducive to the interests of the Company. The purchase having been to a great extent carried out :—

Held, under the circumstances, following "*Era Case*" (1 D. G. J. & S. 29), that the creditors of the selling Company, who had been thus adopted as creditors of the purchasing Company, were entitled to prove against the latter, which was in course of winding up. But, *semble*, that the purchase was not originally within the powers of the directors; and *quare* what is sufficient to constitute acquiescence on the part of shareholders.

RE ERA ASSURANCE COMPANY.

WILLIAMS' CASE.—ANCHOR CASE.

THIS was a rehearing of the applications of a Mr. *Williams* and the *Anchor Insurance Company*, to prove against the *Era Company*, which was in course of winding up. The claimants were originally creditors of another Company, *The Saxon*, whose business the *Era* had purchased, or purported to purchase. The deed by which this transaction was carried out was confirmed by special general meetings of both Companies. On the original hearing in November, 1860 (a), the Vice-Chancellor held that the purchase of the *Saxon* business by the *Era* was ultra vires, and that the claimants did not thereby become creditors of the *Era*.

Upon this decision (the *Saxon Company* being also in course of winding-up,) the *Anchor Company* applied to prove against the *Saxon*, and a similar application was made by the *Era Company*, who had paid, in discharge of *Saxon* liabilities, under the attempted transfer of the business, more

(a) Reported 2 J. & H. 400.

than the amount of the assets they had received. Upon these applications, which were heard in June, 1862, the Vice-Chancellor held that, the transfer being *ultra vires*, the *Anchor* was entitled to prove against the *Saxon*, the consideration for the abandonment of their claim having been since ascertained to have been a nullity. The claim of the *Era Company* was, however, disallowed, on the ground that the *Saxon* could not be restored to its original position. From this last decision the *Era Company* appealed; and, on November 21, 1862, the appeal was dismissed, not wholly on the ground on which the Vice-Chancellor had proceeded, but on the ground that, under the terms of the deed of settlement, either the transfer of the business was not *ultra vires* the purchasing Company, or, if so, had been so acquiesced in as to bind all the shareholders of the Company.

1862.
RE ERA AS-
SURANCE COM-
PANY:
WILLIAMS'
CASE.
Statement.

This hearing is reported in 1 De Gex, J. & S. 29.

In consequence of this decision, the claims of *Williams* and the *Anchor Company* to prove against the *Era* were reheard.

Mr. Daniel, Q.C., and Mr. W. Morris, for *Williams*.

Argument.

Mr. Rolt, Q.C., and Mr. Rodwell, for the *Anchor Company*.

Mr. Giffard, Q.C., and Mr. Reilly, for the official manager of the *Era*.

Mr. Willcock, Q.C., and Mr. Roxburgh, for the Creditor's Representative.

Mr. Daniel replied.

The arguments used and the authorities referred to were substantially the same as on the former hearing, reinforced by the decision of the Lords Justices already referred to.

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 RE ERA
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 COMPANY:
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 CASE.
 Argument.

The following clauses of the deed of settlement of the *Era* were referred to:—

Clause 13 provided, that it should be competent for any general meeting, ordinary or extraordinary, to elect directors and auditors, and to remove them and to vary their number in manner therein provided, and to receive, examine, and pass or reject the accounts, balance-sheets, and reports of the directors and auditors, and (if any) of the actuary, to compel the production of any book, paper, deed, or document belonging to the society, and generally to control the board of directors, to authorise any act to which the sanction of a general meeting was thereby made requisite, and to discuss, and, subject to the following clauses and the provisions of the deed, to determine upon any question, matter, or thing relating to the affairs of the Company which should arise in the course of the conduct or management thereof, and should be brought before such meeting by any shareholder.

Clause 38 provided, that it should be competent for the directors to alter, rescind, or abandon any contract that might be entered into by them on behalf or in the name of the Company, and also to institute, conduct, and compromise, terminate, and abandon, as they might think expedient, any actions, suits, or any other legal proceedings relating to the property or affairs of the society, and also to enter into and execute any such bond or agreement for the submission to arbitration as was specified in this clause, and to compound for or abandon any debt or debts owing to the Company, and to sign or execute any deed of compromise, conveyance, or assignment of estate and effects made by any debtor to the society, and to sign and execute the certificate or other discharge of any bankrupt or insolvent, or other person indebted to the society, and also to authorise the chairman, deputy chairman, or any of the directors, or the manager, to prove any debt due to the

Company from any bankrupt or insolvent, and generally, where the deed was silent or did not otherwise provide, to act in the direction of the concerns of the Company in such manner as at their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters, and things whatsoever as might be requisite or expedient in that behalf.

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CASE.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

These cases have been re-heard before me under the following circumstances :—

Judgment.

In both cases the debts sought to be proved against the *Era* were originally debts of the *Saxon Company* ; and Mr. *Williams* and the *Anchor Company* claimed to have become creditors of the *Era Company* by reason of the *Era* having purchased the business of the *Saxon*, and undertaken all its liabilities, including those of the present claimants who were specially named in a schedule of liabilities annexed to the purchase deed.

On the former hearing, I held that it was not within the powers either of the directors of the *Era* or of the Company in general meeting to purchase the business of another Company, and that these liabilities, therefore, could not be established against the *Era Company*. There was also another question discussed before me, whether there had not been such acquiescence as to bind the whole body of the *Era* shareholders to the purchase of the business as carried out, notwithstanding any infirmity in the original deed. Upon this point, also, I came to the conclusion, that there had been no such acquiescence as to make the deed binding on the whole body of the shareholders. For these

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 COMPANY:
 ANCHOR
 CASE.
 Judgment.

reasons I disallowed both the claims to prove against the *Era*.

Subsequently, the *Era* brought forward a claim in the winding-up of the *Saxon*, to prove for all the debts of the *Saxon*, which they (the *Era*) had paid under the terms of the purchase deed, which I had held to be invalid. Upon that I held that matters had proceeded too far to allow of such a course; that the *Era*, having assumed the business and taken the assets of the *Saxon* (though not, as it appeared, to the full amount of the liabilities which they had discharged), it was impossible to restore the *Saxon* to the position which it occupied before the attempted transfer of the business, and that justice could not be done under the circumstances, by relieving one party to the agreement of the consequences which had resulted from it.

That decision was appealed from, and the Lords Justices, while arriving at the same conclusion, did so upon grounds different from those on which I had proceeded. They gave no opinion whether the relief sought was precluded, as I considered, by the matter having gone too far between the two Companies, but took much higher ground. The Lord Justice *Knight Bruce* rested his judgment mainly on the ground of acquiescence binding on all the shareholders of the *Era Company*, intimating, at the same time, a strong opinion that the original contract was valid. The Lord Justice *Turner* expressed a decided opinion that the original contract (if not strictly within the scope of the deed of settlement) was, at any rate, within the competency of the directors with the sanction of a general meeting. What I have to consider is, whether, now that I am instructed by the judgment of the Court above, I ought still to hold that the purchase of the business was beyond the powers of the Company, and that there was no such degree of acquiescence as would suffice to prevent the Com-

pany from treating the transaction as invalid. If I decide either that the agreement was originally good, or that, by reason of acquiescence, it cannot be questioned, both the claimants before me must be admitted to prove. There is, no doubt, considerable difference between the rejection of the claim of the *Era* to be recouped their payments under the deed, and the establishment against the members of the Company of debts which they say they never became bound to pay. Nevertheless, if I come to a conclusion in favour either of the validity of the deed, or of the sufficiency of the acquiescence relied on, I must admit the claims.

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 COMPANY:
 ANCHOR
 CASE.
 Judgment.

I do not understand the Lords Justices to dissent from my former opinion, that the amalgamation was not within the powers of the Board of Directors; but I went further, and held that it was not within the powers of the Company in general meeting. That opinion, however much it may be shaken by the contrary view of the Lord Justice *Turner*, is, I confess, still unchanged. The business of the Company was to be carried on in the ordinary mode of conducting insurance business, the shareholders relying on the skill and care of the directors; and I cannot see how the purchase of the business of, it may be, twenty other offices in the mass can be regarded, in the absence of any special power, as within the scope of the deed. In this view, I am justified by the observations of Lord *Cranworth* in the case of *Ernest v. Nicholls (a)*, "The transaction in question was a purchase by the one company of the goodwill and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it cannot be said to be within the ordinary scope of the company to purchase the goodwill of another." I entirely concur in that opinion. It seems to me that this view is confirmed by the considera-

(a) 6 H. L. Cas. 401.

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tion that the skill to carry on a particular business, for which directors must be supposed to be selected, is very different from the skill required to guard against fraud, and to conduct to a prosperous issue the purchase of a distinct concern with all its engagements and liabilities. I feel the weight of this argument very strongly; and, indeed, I doubt whether the Lord Justice *Turner* intended to go so far as to say that such a transaction would be within the ordinary scope of the business of a company. For I observe that he refers to the powers of the directors under the 38th section, and to the general power given to the shareholders by the 13th section, of ratifying what the directors may have done. That, no doubt, raises a distinct question, upon which some light is thrown by the case of *Simpson v. Westminster Palace Hotel Company*, where, under somewhat similar words, it was held that a large part of an hotel could be let for a term of years as a public office.

The question as to the right way of construing general clauses of this description is a very large one, which I should be glad to see concluded by authority. Such clauses are of constant occurrence; precisely the same clause came before me in the case of the *Eagle Company*(b), and they have, no doubt, become common forms. It is of great importance, therefore, that the extent of the powers conferred by them should be ascertained. In the *Eagle case* I thought myself justified in holding such a clause sufficient to enable the directors to bind the Company in equity by an undertaking, under their hands, to issue a policy, though the deed required all policies to be under seal; an opinion to which I still adhere. The difficulty that weighs on my mind is this, whether the power to act in the concerns of the Company, as the directors should think most conducive to its interests, must not be taken to involve the condition that the acts done shall

(b) 4 K. & J. 549.

be not dehors the scope of the business for which the Company was originally formed ; and if so, this purchase would not in any view be within the power so understood.

The other point, as to acquiescence, is one of great difficulty. It is undoubtedly very hard to say that shareholders, if not originally bound, can become so by acquiescence in matters of which they are supposed to be cognisant, when they could only become so by attending general meetings, from which many shareholders must always be absent. Still, as both the Lords Justices concur in thinking that there was complete acquiescence in the present case, and having regard to the authorities, such as the *German Mining case* and others, where it has been held that a company is bound to repay moneys applied, though without due authority, for its benefit, I do not feel so strongly on this as upon the other question with respect to the original validity of the deed. My difficulty is that the judgment of the Lords Justices in the *Era case* seems to rest in some degree on acquiescence as between the *Era* and *Saxon Companies*, and it is not easy to see how any acquiescence as between Company and Company can be a bar to the resistance of an individual shareholder who has not acquiesced in the purchase. I am far from saying, however, that justice is not done by this conclusion, when the special circumstances of the case are regarded, the *Era* having taken all the assets, and it being impossible to restore the *Saxon Company* to their old position.

Upon the whole, therefore, though not without some doubt, I have come to the conclusion, that, after the strong expression of opinion—and not opinion only, for it constituted the ratio decidendi—of the Lords Justices, I ought to spare the parties the expense of an appeal by admitting these claims to proof.

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 RE ERA
 ASSURANCE
 COMPANY:
 ANCHOR
 CASE.
 Judgment.

1863.

Dec. 18th.

Practice—Supplemental Answer—Admission on Record.

Where, by an error in the instructions to counsel, a party has been caused unintentionally to make an admission contrary to the fact, the Court allowed the Defendants to file a supplemental answer, on payment of costs.

COOPER v. UTTOXETER BURIAL BOARD.

IN this case the Defendants' Answer (paragraph 46) had admitted in terms that a certain letter mentioned in the Bill had been received, and that no reply had been made to it. In point of fact, two letters had been received; the one which was the subject of the interrogatory had been answered, the other had not been so. The Defendants now wished to file a supplemental Answer to correct the mistake; and they produced the evidence of their solicitor to show that, by some mistake in the instructions to prepare the Answer which had been sent to counsel, the second letter only had been referred to, and that the Answer was only intended to refer to that letter. The question was, whether, the Answer containing an express admission in the Plaintiff's favour, but which was contrary to the fact, the Defendants could now correct the error.

Mr. *H. Cadman Jones*, for the Plaintiff.

Mr. *E. K. Karslake*, for the Defendants.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think this indulgence ought to be granted. There has certainly been most extraordinary negligence; at the same time, the instructions having been verified on oath, and it appearing that only the second letter was there referred to, so that I am satisfied that there was no intention to tell anything other than the truth, I think the supplemental answer may be admitted, but the Defendants must pay the costs.

KEARNS *v.* LEAF.
ALDEBERT *v.* KEARNS.

1862.

Nov. 25th.

1864.

Jan. 28th, 29th.

*Joint Stock
Company—
Policy-holder—
Amalgamation
—Ultra Vires.*

Apolicy-holder, by whose policy the funds of a Company were made liable to pay the sum insured and certain shares of profit by way of bonus—*Held*, entitled to an injunction to restrain the Company from transferring its business and assets to another Company contrary to the provisions of the deed of settlement, and without making provision out of its own assets for payment of the Plaintiff's policy.

THESE two cases are reported together, although heard at different times, both of them being suits by policy-holders in the *Argus* Life Assurance Company, seeking to restrain a proposed transfer of the *Argus* business and funds to the *Eagle* Insurance Company. The former suit was compromised after a full argument, which it has been thought desirable to report as bearing equally upon both cases.

The *Argus* Company was formed in 1833, under a deed of settlement without registration, with a nominal capital of £300,000, of which not more than £12,000 had been paid up. By the prospectus which was issued, and in practice, the business was divided into the "Bonus or Profit Branch," and the "Non-Bonus or Low Premium Branch;" and the assured in the Bonus Branch were by the terms of the prospectus and of their policies, to have £80 per cent. of the profits divided among them. The deed however contained no directions as to this division. The policies provided that the funds or property of the Company should, according to the provisions of the deed of settlement, be subject and liable to pay within one month after the required proof of death the sum assured; and the bonus policies also provided that the assured should, after the first five years, be entitled to share in £80 per cent. of the profits, according to the annual valuation; and the 171st clause hereinafter set forth of the deed of settlement was expressly incorporated as one of the conditions of each policy.

The prospectus of the Company pointed out that the greatest security was given to the assured by the large

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proprietary and subscribed capital, and by the accumulating premium fund.

The Plaintiffs *Kearns* and *Aldebert* were holders of bonus policies. In 1861 the report of the Company showed an annual income of £85,000, and an accumulating premium fund of £500,000.

In 1862, the Directors of the *Argus* Company entered into a negotiation for the transfer of their business and funds to the *Eagle* Insurance Company.

By a resolution passed and confirmed at two general meetings of the proprietors of the *Argus*, on the 11th of August and the 16th of September, 1862, it was resolved that two clauses, A. and B., should be added to the deed. Clause A. was as follows:—That an extraordinary general meeting, specially called for the purpose, shall have full power, with the consent of three-fourths of the votes of the proprietors present and voting, to resolve that the business of this Company shall be transferred to any other Company associated for like purposes and carrying on the like business, upon such terms as may be agreed; and to appoint a committee of not less than five proprietors, of whom three shall form a quorum, for the purpose of carrying such resolution into effect. And that such committee may thereupon proceed in such manner as they shall think proper, to meet or provide for the existing engagements of the Company, and cause so much of the funds or property of the Company as shall not be required for the purposes aforesaid, after making such compensation to the directors and officers of this Company as to the said committee shall appear just, to be paid and distributed among the proprietors for the time being, or their respective executors or administrators, in the proportions to which they shall respectively be entitled thereto.

On the 23rd September, 1862, in reply to an application on behalf of several policy holders, the actuary of the *Argus* stated that no agreement had yet been entered into to amalgamate with another Company, and that therefore no communication had been made to the *Argus* policy-holders.

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On the 25th September, 1862, a circular was issued to the policy-holders by the actuary of the *Argus*, stating the negotiation with the *Eagle*, and that the principal terms were—"The *Eagle*, on receiving £360,000 of the funds of the *Argus*, to take all the liabilities of the *Argus*, the participating policy-holders to share *pari passu* with those of the *Eagle*."

On the 14th October, 1862, at a special extraordinary general meeting of the *Argus* proprietors, it was resolved that it was expedient to transfer the business of the *Eagle* on the basis of a proposal laid before the meeting; and a committee was appointed to negotiate and conclude the transfer or amalgamation.

On the 28th of October, 1862, a second circular was issued to the policy-holders, signed by the members of the committee, stating that an agreement had been entered into for the transfer of the business to the *Eagle*, and setting forth the supposed advantages which would accrue to the policy holders.

The agreement was entered into between the *Argus* committee and the trustees and directors of the *Eagle* Company, and executed on the 8th of November, 1862, and provided, that the business and goodwill of the *Argus* should be transferred to the *Eagle* as from the 30th of June, 1862; that the debts and liabilities of the *Argus* should be borne by the *Eagle*, who were to indemnify the *Argus* against them; that all the property of the *Argus* on the 30th of June, 1862, should vest in the *Eagle*; that

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the *Eagle* Company should pay to the *Argus* £164,000, in such manner as the committee should direct; that shareholders in the *Argus* should have allotted to them five *Eagle* shares at £6 per share for every *Argus* share; that *Argus* policy-holders should have the option of an indorsement on their policies or new *Eagle* policies for the same amount, at the same premium and, as to participating policies, conferring the same privileges, as if they had originally insured in the *Eagle*, including, as to bonus policies, the right of participating as from the 30th June, 1862, *pari passu* with the *Eagle* policy-holders; and also to receive such sum as would have been payable as bonus by the *Argus* Company up to the 30th of June, 1862; that two directors of the *Argus* should join the *Eagle* board; that either party might cancel the agreement by notice within the time specified.

The two bills were filed to restrain the said transfer, the bill in *Aldebert v. Leaf* praying that it might be declared that the proposed or any like agreement ought not to be carried into effect with the *Eagle* or any other Company; that the Plaintiff might be declared to be entitled to the security of the funds and property of the *Argus*, or a competent part thereof, and that such competent part might be secured to answer the Plaintiff's policy; that any sum received by way of compensation by the Defendants, the directors and secretary of the *Argus*, might be treated as assets of the *Argus*, applicable to make good any bonus coming to the Plaintiff; that an account might be taken of the profits of the *Argus* represented by the said sum of £164,000, and that the Plaintiff might be paid such bonus as he was entitled to thereout; and for an injunction to restrain the directors and officers of both Companies from proceeding with the said agreement; and that, if necessary, the Plaintiff might be taken as representing all the bonus policy-holders in the *Argus* other than the Defen-

dants, and that the Defendants (some of whom held non-bonus policies), might be taken to represent all the non-bonus policy-holders.

The deed of settlement of the *Argus* contained the following clauses.

19. That three-fourths of the votes of the qualified proprietors present at two successive extraordinary general meetings specially called for the purpose, or at the ballots or ballot which may be taken in consequence of being demanded at such meetings or either of them, shall be requisite to make new laws, regulations, and provisions for the Company or to dissolve the Company.

26. That it shall be lawful for every annual general meeting to declare the amount of the profits which shall have accrued to the Company conformably to the statement made out by the actuary of the Company, and to be produced at the meeting by the board of directors pursuant to the direction hereinafter for that purpose contained. [By a subsequent resolution, power was given to divide the whole or any portion of the profits among the proprietors according to their interests by way of bonus.]

28. That two successive extraordinary general meetings, specially called for the purpose, shall have full power to make any new laws, regulations, and provisions for the Company, or to amend, alter, or repeal, either wholly or in part, all or any of the existing laws, regulations, and provisions of the Company.

29. That two successive extraordinary general meetings, specially called for the purpose, shall have full power to come to a resolution to dissolve the Company, provided such dissolution shall have been previously approved of and recommended by the board of directors, but not otherwise.

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64. That the board of directors shall cause the sum to be claimed under every policy issued by the Company, except in those cases in which the board are hereinbefore authorised to defer the payment thereof, to be paid within three calendar months after proof of the death of every person on whose life the assurance shall have been made shall have been received at the office of the Company, and any other satisfactory proof and information respecting the claim that the board shall require shall have been received at the office for the time being of the Company in *London* or *Westminster*. Provided nevertheless, that it shall be lawful for the board of directors to pay the sum claimed under any policy, either immediately upon or at any time before the expiration of three calendar months after such proof and information as aforesaid being made, on deducting from such sum a discount after the rate of £5 per cent. for every £100 by the year

86. That, when and so often and from time to time as an annual general meeting shall have entered into a resolution that the whole or any part of the profits, the amount of which shall have been declared at such annual general meeting, shall be added to and consolidated with the instalments which shall have been previously paid upon the shares then held in the capital of the Company, the board of directors shall, as to the profits or part of the profits to which the resolution shall extend, add such profits to and consolidate the same with such instalments accordingly.

107. That whenever two such extraordinary general meetings as hereinbefore mentioned shall, upon the previous recommendation of the board of directors, have come to a resolution to dissolve the Company, the board of directors shall cease to grant or renew any policy or annuity on behalf of the Company, and shall proceed in such manner as they shall think fair and reasonable to meet the ex-

isting engagements of the Company, and shall cause so much of the funds or property of the Company as shall not consist of money, and as shall not be required to meet the existing engagements of the Company, to be forthwith sold or otherwise converted into money in such manner and upon such terms as the board shall think proper; and after such sale or conversion shall cause so much of the funds or property of the Company as shall not be required to meet the existing engagements thereof to be paid and distributed amongst the proprietors or other holders for the time being, or their respective executors or administrators, in the proportions in which they shall respectively be entitled thereto; and immediately after such payment and distribution the Company shall be dissolved, and these presents and every clause, article, matter and thing herein contained shall thenceforth cease, determine, and be void.

109. That, subject and without prejudice to the powers hereinbefore given to the general meetings, the board of directors shall have the entire management of and superintendence over the affairs and concerns of the Company; and no other proprietor or proprietors, except the auditor, secretary, and actuary, unless he or they shall be appointed for that purpose by the board, shall be at liberty to interfere or intermeddle with the affairs and concerns of the Company; and the board shall in all cases provided for by these presents or hereafter so provided for by general meetings, act in strict conformity to the laws and regulations hereby established or hereafter to be established by general meetings; but in all cases for the time being unprovided for by these presents or by general meetings it shall be lawful for the board of directors to act in such manner as shall appear to them best calculated to promote the welfare of the Company. And for the better guidance of the board of directors in their management of and superintendence over the affairs and concerns of the Com-

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pany, it shall be lawful for an extraordinary board of directors, specially called for that purpose, to make whatever bye-laws, rules, and regulations they shall think proper, provided the same be not inconsistent with or repugnant to the fundamental principle or constitution of the Company as established and settled by these presents, or as altered and changed by virtue of the power hereinbefore given to the general meetings for the purpose, and at any time to alter or repeal all or any of the bye-laws, rules, or regulations which may be so made.

170. That the funds or property of the Company shall consist of the said capital of £300,000, and of all sums to be from time to time received by the Company for assurances effected by the Company, for the revival of forfeited policies, for annuities granted by the Company, and for such shares in the capital of £300,000, as shall from time to time be forfeited and sold for the benefit of the Company, and of all sums besides any part or parts of the said capital of £300,000, as shall from time to time be recovered in any action or suit that may be prosecuted against any person or persons breaking or refusing to perform or comply with any of the covenants, conditions, and stipulations contained in these presents, and which on his, her, or their part ought to be performed and complied with, or against the heirs, executors, or administrators of such person or persons, and of the interest, dividends, and annual produce and accumulations of so much of the said capital of £300,000 and of so much of the sums to be received and recovered from time to time as aforesaid, as shall from time to time be actually in the hands of the Company and remain unapplied and undisposed of, after answering the claims which persons assured and annuitants shall from time to time have in the Company, and the expenses attending the purchase and support of the house and offices and the various other claims upon and expenses of the Com-

pany, and also of the stocks, securities, house and other property, in or upon which, in pursuance of the powers, authorities, and directions herein contained, the said sums, interest, dividends, annual produce, and accumulations, or any part thereof respectively, shall be laid out and invested.

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171. That the funds or property of the Company for the time being remaining unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities contained in these presents, shall alone be answerable for the claims and demands of persons assuring with the Company and annuity creditors; and the directors signing the policies or the instruments securing the annuities shall be personally liable to the person to whom the policies shall be given or annuities granted, for the application of the said funds or property in discharge of the moneys secured by the said policies and of the said annuities, and not further or otherwise; and that neither in respect of the persons claiming under the said policies or the persons entitled to the said annuities, nor in respect to the directors who may have signed policies or instruments securing annuities, or any of their heirs, executors, or administrators, the proprietors at large of the Company shall be answerable indirectly or directly, further or otherwise than as to their respective shares not subject to prior claims or demands in the Company's said capital of £300,000, it being the intent and meaning of these presents that no claim upon any policy or upon any instrument securing any annuity shall be enforced against any one or more of the directors, his, her, or their heirs, executors, or administrators, to a greater extent than the funds or property of the Company at the time of recovering upon such policy or instrument securing such annuity shall be competent to reimburse him or them, and that the person or persons against whom any such

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claim shall have been enforced, or his or their executors or administrators, shall have no remedy against any proprietors further or otherwise than as to their respective shares not then subject to prior claims or demands in the Company's said capital of £300,000, at the time of seeking such reimbursement, anything contained in these presents, or to be had, made, done, or executed by the board of directors or other officers or members of the Company, or by any general meeting of the Company or otherwise, to the contrary thereof in anywise notwithstanding.

The substance of this clause was indorsed on each policy.

Nov. 25th. The cause of *Kearns* and *Leaf* came on upon a motion for injunction.

Argument. Sir *Hugh Cairns*, Q. C., and Mr. *Bagshawe*, for the Plaintiff.

The theory of the Company seems to be, that they have power to issue participating policies to any extent they please, and then alter the terms of their contracts with the policy-holders.

These contracts secure three things to the policy-holder :
 1st. The payment of a fixed sum within so many months after proof of death. 2nd. The addition to his policy of such bonuses as may be declared. 3rd. A charge on all the funds of the Company to secure his claim.

The contract will be broken in all these points if the projected transfer be carried out ; and the question for the Court is, whether one of the contracting parties is subject to have his contract varied in this manner at the pleasure of the other.

There are Companies which have large powers of amalgamation inserted in their deeds of settlement, and persons

who effect policies with such Companies know what is before them ; but there are Companies (of which this is one) which have no such powers ; and persons who like to know, that, when they have embarked in any concern, they will sink or swim with it, without the risk of being handed over to a new set of directors, about whom they know nothing, are naturally attracted to such Companies.

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Kearns
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But then the Company say, we are giving you a better security, and they give us certain statistics of the two Companies to prove that to be so. That may be so : but our case is this, that you have no right to force us in this manner into partnership with persons with whom we never agreed to be partners : if indeed there were powers contained in the deed of settlement enabling a majority to amalgamate, the minority, however evil they might think it, would be bound to acquiesce ; but if there was no such power (as here) the best amalgamation conceivable would be inoperative in this Court as against a single dissenter ; and therefore whether we shall be in fact damnified or not is immaterial, if we refuse to consent.

But again they say, the deed of settlement contains powers for its own amendment, and power for this amalgamation has been inserted therein under the authority of these provisions, and persons who contract with notice of such power of alteration must take the consequences of the exercise of that power. But no such provisions can enable a Company to alter contracts which they have already entered into ; such alteration can only be binding as between the shareholders themselves, or as between the Company and subsequent policy-holders.

Suppose an alteration of the deed declaring that the sums secured by the policies should be paid subject to a deduction of 10 per cent. In this case they propose to take away £168,000 out of our security money, on which

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we have a specific charge, and to annihilate our security to that extent for the benefit of shareholders and office-holders in the *Argus*.

The *Athenæum* case shews that though policy-holders are unable to know, till the winding up comes, what their exact rights may be, still those rights might have been protected by injunction in the meantime had they applied.

Mr. *Chapman Barber* for the Defendants *A. S. Arden* and *S. W. Johnston* (directors of the *Argus*, who had opposed the amalgamation), supported the Plaintiff's case.

The *Solicitor-General* (Sir *Roundell Palmer*), Mr. *Rolt*, Q.C., and Mr. *Erskine*, for the Defendants, represented the *Argus Company* :—

This is a case of the first impression. The only cases at all like it, are, first, *Law v. Indisputable Life Assurance Company* (a), (in which case, however, the policy had already become a claim, and the holder was therefore entitled to an account and receiver); and secondly, the case of the *Era* (b), the authority of which case has, however, (so far as it bears upon this point), been much shaken by the remarks of the Lords Justices on another occasion, to which we will come presently.*

In the first place, the Plaintiff can have no claim till he is dead; then, no doubt, if he have in the meantime paid all his premiums, which he is under no obligation whatever to do, his representatives will become entitled to the sum secured by this policy, together with any bonuses which may have been declared.

Now, first, it is the idlest thing to say that a contract of this sort can make any particular arrangement entered into

(a) 1 K. & J. 223.

(b) 2 J. & H. 408.

* At the date of this argument the re-hearing of the *Anchor Case*, *Re Era*, reported ante, p. 672, had not taken place.

by the directors, and which is good as against the shareholders, bad as against the Plaintiff.

In the next place, whatever the effect of the contract contained in this policy may be, it is enforceable by law against the contractors, and that is the proper forum for the Plaintiff to resort to.

Then, whether this amalgamation be ultra vires or no, there has been no breach of the contract; that appears by the case of *King v. Accumulated Company* (a).

It is true, that, if the contract were clear, the question of whether or no the amalgamation is beneficial might become immaterial; but where the construction and force of the contract itself is doubtful, that is not so; it then becomes very important to consider whether the arrangement made by the directors is or not bona fide for the benefit of all parties.

The question whether Companies have or have not power to amalgamate where there is no express power for that purpose in the deed of settlement, was much discussed before your Honour in the case of the *Era* and *Saxon* Companies. That case was not directly appealed from, but the question came incidentally before the Lords Justices of Appeal, when your Honour's decision was not acquiesced in. That arose in this way, your Honour having decided that the amalgamation was invalid, the *Era* applied for leave to prove against the *Saxon* for the money which they had paid on the faith of the amalgamation: your Honour rejected the claim, and that decision was affirmed by the Lords Justices (b): but the remarks of their Lordships on that occasion threw, at least, a doubt on the authority of the previous case. Lord Justice *Knight Bruce* said: "It appears to me, that that deed, following and grounded on the several acts which are in evidence, bound and binds the *Era* and *Saxon* Companies, and their members and estates respectively." Lord Justice

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v.
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(a) 3 C. B., N. S., 151.

(b) 1 D. G., J., & S. 29.

1862.

KEARNS

v.

LEAF.

ALDENNET

v.

LEAF.

Argument

Turner concurred in the practical result, without determining the question of the validity of the deed; but he said, that at all events the deed was not void, but merely voidable in equity, and that therefore the *Era* was bound by it; so that *they* could not make any claim to recover what they had paid.

Further, it is at least worthy of consideration, whether power to dissolve the Company does not necessarily include power to make such an arrangement as the present: a power to dissolve is contained in the deed, (clause 107); and the same body which has power of dissolution has also the minor power of passing rules and regulations, (clause 109). The powers of the directors are no doubt very limited, but the powers vested in the general meetings are not limited (clauses 19, 29).

Then I would ask, does not the power of re-assurance, which is unquestionably vested in the directors, imply power to do as they have done? What is this more than a gigantic re-assurance of all their risks at one operation? and if they might—as they undoubtedly might—re-assure every policy separately, why not all together?

It cannot be denied that such a power is exceedingly beneficial. There have been forty-seven undisputed amalgamations in the last eighteen years, as is stated in our evidence. Companies must have this power, or else, when they find their business not increasing as they could desire, both shareholders and policy-holders will be forced to drift to one common ruin. We represent the majority of the directors, whose concurrence in the amalgamation must therefore be assumed.

I ask the Court to look at the powers vested in the directors in cases of dissolution. On dissolution the directors are not to grant any new policies, but that does not interfere with existing contracts: *Cook v. Collingridge* (a). On dissolution

(a) Jac. 607.

directors are to act as they think fair and reasonable, (clause 107). Therefore they may re-assure all their risks with another Company; that would not affect their liability to policy-holders who refused to accept the new Company, but they would thus guarantee their own shareholders.

[The VICE-CHANCELLOR.—The only contract in the policy is against the fund.]

The *Solicitor-General*.—Anything that goes back into the hands of the proprietors would be in the same position as unpaid-up capital, and would be liable to meet this claim.

The discretion vested in the directors might in any case involve the return of a large balance into the pockets of the shareholders. A policy-holder has no contract which enables him to impound the funds or to interfere in any manner with the internal management of the Company. If all policy-holders had a continuing lien on the fund, it would be impossible for the directors to exercise their powers of management at all. Suppose a variation of the deed empowering the directors to invest the funds on personal security, this would be clearly within the power of the general meeting; yet if my friend's contention be well founded it could not be acted on as against a single dissentient policy-holder.

Equity will protect special funds proved to be liable to a contract, but will not vary the legal results thereof. What then can be clearer and more conclusive than the case of *King v. Accumulated Company* (a), where it was held that a policy-holder had no specific lien on the funds of the Company.

[Sir H. Cairns referred to *Evans v. Coventry* (b).]

(a) 3 C. B., N. S., 151.

(b) 5 D. M. G. 911.

1862.
KEARNS
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The *Solicitor-General*.—That was a case of a mutual assurance company; a bill by some members on behalf of themselves and all other members except the Defendants; moreover, some of the Plaintiffs had debts then actually vested.

There is no implied covenant to carry on business on the terms of the deed of settlement; and as the Judges said, in the case I last cited, the Plaintiff is in this further dilemma: either the transfer is valid under the terms of the deed of settlement, therefore there is no case; or else it is ultra vires and invalid, therefore the Plaintiff is not damnified.

The largest possible right of a policy-holder would have been a covenant by the Company to pay the debt when it became a claim; all the limitations introduced into the policy are for the purpose of restricting that right. From this it follows, that the Plaintiff's right could not be greater than a right to an injunction to restrain an unlawful application of the funds under clauses 28 & 29; but that would not interfere with the ordinary method of amalgamation, which does not involve any use of the funds not within the usual power of investment.

The Bill is as novel in point of law as it is in fact. So far as the Plaintiff is concerned, the amalgamation gives him additional security and takes nothing whatever from him.

If such interference with the internal management of the Company as this is permitted, where are you to stop? A policy-holder, by his contract, has not even a right to read the deed of settlement.

[The VICE-CHANCELLOR.—He ought to see it if he is a prudent man; he is affected with full notice of it.]

Mr. *Erskine*.—It is not the practice to permit him to do

so. If a policy-holder can interfere with such an arrangement as this, why not also to prevent the board from taking lives at extravagant rates, or at rates which he may consider to be so. The right of the policy-holder at law is limited to an action against the directors who signed his policy, whose liability again is limited to the funds of the Company (clause 171).

1862.
KEARNS
v.
LEAF.
ALDEBERT
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Then, as to those funds, the only funds which are charged with the Plaintiff's debt are those which may be existing when his policy becomes a claim.

[The VICE-CHANCELLOR.—Suppose the Directors were appropriating to their own use the whole of the funds?]

There might be a right to move on the ground of *fraud*, but not of *contract*. [They also referred to *Solvency Guarantee Company v. York (a)*, *King v. Malcott (b)*, *Jones v. Garcia del Rio (c)*.]

Sir *Hugh Cairns* in reply.—My learned friends have used very great boldness in this matter. The assured, on entering into their contract, may be supposed to say, we are bound to look only to the funds of the Company, but we have a very strong estimate of the security of those funds; but the argument goes to the full extent that it is in the power of the Company to divide the whole fund among themselves.

[The VICE-CHANCELLOR.—If without fraud.]

Yes; and if we suppose the directors to consider such a division the most desirable method of investment, the policy-holders will, upon this argument, have no remedy either against the funds or the directors.

That is the very case here; they propose to divide £165,000 amongst themselves, and to hand us over to the funds of *The Eagle*, as to which we know nothing whatever.

(a) 3 H. & N. 588.

(b) 9 Hare, 692.

(c) T. & R. 297.

1862.

Kearns

v.

Leaf.

ALDERBERT

v.

Leaf.

Argument.

The case of re-assurance has nothing to do with this case. In re-assurance there is no interference with the funds of the Company.

But the main question is this: suppose there was no provision for altering the deed of settlement, let us see what the position of the directors, shareholders, and policy-holders respectively would be, and then see what is the effect of the provision for alteration.

In a somewhat similar case—*Parsons v. Spooner* (a)—where a solicitor had made a special contract with a company to look to the deposits merely Vice-Chancellor *Wigram* sustained the lien of the solicitor under this contract.

The fallacy which has misled the Defendants is this: they have only looked at the endorsement on the policy, not at the face of the deed, which gives us an express charge on the funds. But they say, the policy is not a charge during the life of the assured. Suppose I say, I agree that *A. B.* shall have a sum out of my estate at the end of a year from this time; but I stipulate that he is to have no personal remedy against me. Would a Court of Equity allow the estate to be entirely disposed of during the year? The true answer is, that the funds are to be answerable to us at the proper time, according to the provisions of the deed of settlement, and are to be perpetually ready for that liability.

Take the case of a dissolution in which the shareholders divided the whole property of the Company, would not a policy-holder be entitled to say, don't throw me upon 2000 shareholders, but keep the funds together to answer my claim?

How does the power to alter the deed of settlement affect this case? No such alteration would vary our rights without our consent.

(a) 5 Hare, 102.

Evans v. Coventry was not founded on the decease of some of the policy-holders, it puts the case exactly as a trust where the policy-holders are the cestuis que trustent and the directors are the trustees. Lord Justice *Knight Bruce* likens it to a case of waste; Lord Justice *Turner* says, "the Plaintiffs are persons who have claims on the fund of which the Defendants are trustees." It is not according to the course of this Court to say, "the proceeding is ultra vires, therefore the Plaintiff is not damnified," but "ultra vires, therefore we will restrain it."

1862.
—
KEARNS
v.
LEAF
ALDEBERT
v.
LEAF.
—
Argument.

This case was compromised before judgment had been given on the motion.

Shortly after the settlement of this cause, the *Eagle* Company gave notice to determine the agreement; and on the 7th of January, 1863, the solicitors of the *Argus* wrote to the solicitors of the Plaintiff *Aldebert*, stating, that "although the agreement with the *Eagle* Company was now at an end, their clients were convinced, that, under existing circumstances, an amalgamation of the *Argus* with some other assurance company, if not with the *Eagle*, was a real necessity, and that they therefore declined to submit (as had been asked) to a perpetual injunction." A long correspondence ensued with reference to the settlement of the suit, the Plaintiff insisting on a perpetual injunction and the payment of costs. This was not assented to, and ultimately the cause came on upon motion for decree.

Mr. *Daniel*, Q.C., and Mr. *J. N. Higgins* for the Plaintiff.

1864.
Jan. 26th.

The argument on behalf of the Company in *Kearns*

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 KRAEHN
 v.
 LEAF.
 ALDEBERT
 v.
 LEAF.
 ———
 Argument.

v. *Leaf* went, as will be remembered, mainly to these two points: first, that the Plaintiff had no such charge on or interest in the fund as would entitle him to maintain a suit before his policy became payable; and secondly, that he was not entitled to the relief prayed, namely, an injunction to restrain the proposed amalgamation. Probably the same contention will be attempted in this case.

As to the first point, however, we do not contend that the Plaintiff has any such charge on the funds as would give him priority. The contrary was decided in the *State Fire case* by your Honour, and that judgment was affirmed on appeal (a). Notwithstanding this, however, the principle of *Law v. Indisputable Company* (b) is still maintained, that a policy-holder has a right to have the fund to which he looks preserved from misapplication. This is the ground of our claim. *Evans v. Coventry* does not appear to touch this case; the decree there, whatever it amounted to, turning entirely on the fact of the insolvency of the Company. The Plaintiff's right of suit to preserve the assets being thus clear on the authorities and on principle, the only question is, whether the agreement for the transfer of the fund to the *Hagle Company* was a lawful or an unlawful dealing with the fund. That agreement, it was said, has been abandoned; but on the question of costs alone it would be necessary to determine how far we have been right in our claim; and it is also necessary to guard against the revival of the same design in the shape of a fresh amalgamation with some other company, which is not only possible, but is declared on the part of the directors to be in their opinion an absolute necessity.

Was then this agreement ultra vires or was it not? And if not otherwise ultra vires, was it not so as against us as being in derogation of our policy? Now, in the first place,

(a) 11 W. R. 1011.

(b) 1 K. & J. 223.

it is clear that in the absence of special powers for the purpose, no company can sell its business to another: *Ernest v. Nicholls* (a) is quite decisive as to that.

To ascertain whether the Company had a right at all or as against us to transfer their business and part with their funds, it is necessary to look at the terms of our policy based on the prospectus circulated and acted on for years by the Company, as well as on the deed of settlement.

Our policy in terms gives us a right to share in four-fifths of the profits of the concern, a right wholly independent of the deed of settlement which is only material by the incorporation of the 171st clause (the limited liability clause) and perhaps by the description of the profits as being "the profits according to the annual valuation."

Whether such a policy as ours would make us partners in the strict sense, it is not necessary to argue, (though it may be observed, that the *English and Irish Company's case*, in which an argument of that kind was rejected, was very different in its circumstances from the present); but it is enough that a certain definite interest in the profits is given to us to entitle us to an account, and to prevent those profits from being dissipated, in contravention of the terms of our policy. The only provision in the deed about the valuation is the 26th clause, that a general meeting may declare profits conformably to the actuary's statement; and so far as the deed is concerned, these profits would belong to the shareholders, who have agreed to assign four-fifths of them to the bonus policy-holders. This is very different from the *English and Irish* deed, which expressly provided that the bonus policy-holders were to take a certain proportion of such sum as should be determined by the shareholders to be the profits of the concern. The right to an account of profits was there expressly excluded, while here it follows from the interest given to us by our policy.

(a) 6 H. L. Cas. 401.

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KEARNS
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LEAF.
ALDEBERT
v.
LEAF.
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 KEARNS
 v.
 LEAF.
 ALDERBERT
 v.
 LEAF.
 —
Argument.

Independently of our right as interested in profits, we are entitled to restrain any dealing with the fund to which we look, which would be inconsistent with the rights given to us by our policy. Even if the deed gave powers to alter the whole constitution of the Company, those powers could not be exercised after the grant of a policy in such a manner as to derogate from that grant. It would make no difference even if we were supposed to have notice of the entire deed, because, knowing its provisions, we must have been entitled to assume that they would not be acted upon in a manner inconsistent with our rights under the policy.

But in fact we had notice of no part of the deed, except the limited liability clause indorsed on the policy. The deed of a registered Company may be notice to all the world; but this Company was not registered, and we had no means of getting an inspection of the deed. The whole doctrine as to notice in these cases turns upon registration: *Ernest v. Nichols (a)*, *Greenwood's case (b)*.

Then apart from the question whether the transfer could be good against us, it is clear that it was void altogether as ultra vires, as appears from the case already cited, and from the *Era case*, where the transaction was sustained only on the ground that the requisite power might perhaps be found in the deed, and that at any rate the question was closed by acquiescence.

Mr. *C. C. Barber*, for Plaintiffs who had obtained an interlocutory injunction in another suit, and were allowed to attend the proceedings.

Mr. *Archibald Smith* for a trustee.

Mr. *Rolt*, Q. C., and Mr. *Erskine*, for the *Argus Company* :—

(a) 6 H. L. Cas. 419.

(b) 3 D. M. G. 459.

1. Whatever the deed of settlement authorises may be done by the directors without consulting the policy-holders, who unquestionably had notice of the deed, if that were necessary; though in truth, it is enough that under their policies they were to take what the deed gave them and nothing else. And the powers of the deed, with the supplementary resolution A. (and even without it) are sufficient to authorise the transfer. The 28th and 29th clauses together with resolution A. give the fullest possible powers to the directors to wind up by dissolution or by amalgamation as the best mode of dissolution. It is clear too that the course proposed was the best for the policy-holders. To wind up or to let the business die out would have been most injurious, and the only way in which policy-holders can be protected when a business ceases to be progressive is by transfer to another office.

Again, the Plaintiff has no present interest whatever to sustain a suit. His only right is to sue when his policy becomes payable. In the meantime, he has no charge or lien, and no right to an account of the fund. The now exploded fallacy in the argument on this point has been, to suppose that the limited liability clause has the effect of enlarging the policy-holder's rights and giving him a sort of charge, whereas it is nothing whatever but a stipulation that the rights he would otherwise possess against the funds of the Company and the shareholders personally shall be curtailed by excluding the liability of shareholders beyond a certain amount. All this is settled by the cases already referred to, and in *King v. Accumulative Company* (a), it was held, that a policy-holder has no right until his policy matures into a claim, that a Company is under no implied contract to continue its business for the sake of providing him with a bonus out of profits. The Company here had express power to dissolve, and this

(a) 3 C. B., N. S., 151.

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Argument.

1884.

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LEAF.

Argument.

transfer was a mode of dissolution expressly sanctioned by resolution A. There is no more ground for a Bill to restrain this Company from doing what it pleases with its funds, than there would be for a Bill by a person holding a promissory note payable twelve months hence, to restrain his debtor from wasting his estate by extravagance in the meantime.

Mr. *T. Stevens* for the *Eagle* Company.—We were unnecessary parties, and the Plaintiff must pay our costs.

Mr. *Daniel*, in reply.—If the agreement was ultra vires, as to which there can be no question, we are entitled to a perpetual injunction, as they still threaten to enter into some similar arrangement.

VICE CHANCELLOR SIR W. PAGE WOOD :—

The *Argus* Company have entered into a contract, by which it is stipulated that the funds and property of the Company shall be liable, according to the deed of settlement, to pay the sum insured by the Plaintiff, and also to divide £80 per cent. of their profits by way of bonus.

One of the questions discussed has been, how far a charge or lien is created by a contract of this kind. In the *State Fire* case, I came to the conclusion, upon similarly worded instruments, that no such charge was created as would entitle policy-holders to any priority; and I observe, that on the appeal of that case Lord Justice *Turner* said, that he had taken the same view in *Evans v. Coventry*. The Lord Justice *Knight Bruce*, it is true, expressed himself as not entirely free from doubt on the point; but in the judgment of the Lord Justice *Turner*, I find some obser-

vations which will greatly assist one in arriving at a conclusion in the present case. The passage I refer to is this (a): "In considering the meaning of these words, and the effect to be given to them, regard must be had, I think, to the state of the law which led to their introduction. By the common law every shareholder, as a partner in the Company, would be liable on all its contracts; and provisions of this nature were no doubt introduced for the purpose of limiting their legal liabilities, not for the purpose of creating a charge in equity. Again, it is to be observed, that it was necessary that some words should be introduced into the operative parts of the policy in order to create an express contract. If the case had been left on the proviso alone, there would have been nothing more than an implied contract. If, instead of the words 'stocks and funds of the Company,' the words introduced had been 'the Company shall be subject and liable to pay,' the very inconvenience which no doubt was intended to have been avoided would at once have been created. There was a sufficient reason, therefore, for the introduction of the words in question, without imputing any intention to create a charge in equity; and certainly, in considering the effect to be given to those words, the inconvenience which would result from the construction contended for by the Appellants ought not, I think, to be disregarded. It is obvious, for the reasons assigned in the course of the argument, that this construction would paralyse the Company to the prejudice not merely of the shareholders, but of the policy-holders also, with the exception, perhaps, of the few among them on whose policies claims might first have been matured. The business of the Company could not possibly have been carried on, and every claim on a policy might be made the foundation of a suit in equity. It is remarkable to find, as long as policies of this description have been in use, there is not, as far as

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 KEARNS
 v.
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(a) 11 W. R. 1012.

1864.
 KHAENS
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 ALDERBERT
 v.
 LEAF.
 Judgment.

I am aware, any instance of any claim upon them having been advanced in equity until very recent times. I do not think, therefore, that, even independently of the provisions of the deed of settlement of this Company, the policies in question would operate as a charge on the stock and funds of the Company; but it is now settled, not only by *Ernest v. Nicholls* (a), but by *Balfour v. Ernest* (b), that persons dealing with such companies as these are bound to look to the terms of the deed of settlement; and looking to the terms of the deed of settlement of this Company, I do not think it was in the power of the directors to appropriate the stock and funds of the Company to the payment of the policies, so as to create a charge paramount to all the other claims of the Company. I think, therefore, on this ground also, the policy holders are not entitled to the preference claimed by them. In the course of the argument in this case, the cases of *Law v. The London Indisputable Life Company*, *The Athenæum Life Assurance Society*, and *Evans v. Coventry* were much commented upon, and I do not hesitate to say, that in this case the word 'charge' has been unguardedly used both by the Vice-Chancellor Sir *William Page Wood*, and by myself; but certainly, so far as I am concerned, I did not use the word in the sense which the Appellants attributed to it. From the time when these cases have first been brought forward, the difficulty which has now arisen has been present in my mind. It struck me, when the case of *Evans v. Coventry* first came before us upon a motion for a receiver, that it was not necessary then to consider it, there being a sufficient case for interference on the ground of breach of trust. Whether we afterwards went too far in the decree in that case, I am not prepared to say; but so far as my recollection serves me, our intention certainly was not to decide anything between the policy-holders and the general creditors; and I doubt, indeed, whether any such question was involved in the

(a) 6 H. L. Cas. 401.

(b) 5 C. B., N. S., 601.

suit; but however this may be, and whether the cases referred to were rightly or wrongly decided,—though I desire to be understood as not meaning to cast any doubt on the right of a Court of Equity to interfere in such cases as the present, where there has been waste or breach of trust, I am satisfied that there is no lien or charge created by the policies in this case.”

The observations I have read seem to me of the greatest importance in their application to the case before me. Here the terms of the policy extend the contract a trifle beyond the form of the *State* fire policies, because, not only are the assets of the Company to be liable according to the deed, but the directors who sign the policy (not the directors for the time being) engage in effect that the assets of the Company shall be administered according to the deed; that is, that the fund shall be kept in the state in which it ought to be kept, these directors, of course, being indemnified by the Company. Now I apprehend, that under these stipulations the policy-holders have no right to meddle with anything, wise or unwise, which the Company may do in accordance with the deed. For example, if the Company invest in a hazardous or even ruinous security, the policy-holders are not entitled to interfere. It would be extremely mischievous to allow such interference. Still the conduct of the Company might reach a point of absolute waste of the assets in contravention of the provisions of the deed, at which the right of the policy-holders to intervene might be considered to arise. In the passage I have read, the Lord Justice *Turner* makes an express reservation of such a contingency; and it is no answer to appeal to the decisions at Common Law, where it has been held that the Company (in such a case) is under no contract to continue its business; because, what the policy-holders would insist on, would only be that if the business were discontinued, they shall either be paid, or else the fund preserved to meet their claims when they might arise. The principle on which the

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Plaintiff's case is founded here is, that the fund which was held out to him as his security, and to which he has himself contributed, shall not be misapplied contrary to the provisions of the deed. He says that he comes here to prevent a waste of the assets. His position is somewhat analogous to that of a person having a contingent debt against a testator's estate, who may come into this Court to prevent the estate being paid away to legatees, or wasted or thrown away by the executors. The argument for the Company, as I understand it, goes this length, that the policy-holder is simply a contingent future creditor minus the personal remedy. If that were the whole of the contract, it would be very different from what persons who insured in the Company must have supposed. They could not have imagined that it was to be in the power of the directors or the Company to destroy all their interest under their policies, leaving them without redress until their policies should have matured by death. I certainly do not think that this is the conclusion to be drawn from the terms of the particular contract which I have to consider in this case. In my opinion the Plaintiff did acquire under that contract such a species of interest in the fund as would entitle him to interfere to save the property from being wasted contrary to the provisions of the deed.

The only question is, whether the proposed transfer was contrary to the provisions of the deed ; and I am of opinion that it clearly was so, even supposing the supplementary resolutions to be valid as against the policy-holders. The deed gives a power to dissolve ; but the 107th clause expressly recognises the obligation in the first instance to provide for existing engagements, and directs that so much only of the funds as shall not be required for this purpose shall be distributed among the proprietors. Even the resolution A., which purports to authorise a sale of the

business, recognises the obligation to provide for existing liabilities ; and it seemed to me that under that restriction the resolution might, perhaps, be considered valid as a mode of winding up. It was argued, indeed, that, the policy-holders having the security of the deed that no dissolution should take place without the previous recommendation of the Board, it was not competent for a general meeting to pass such a resolution as this under the powers of clause 28. I am not quite clear as to this ; for the policy-holders took according to the provisions of the deed, including this 28th clause, and therefore all merely directory clauses as to the machinery by which the Company should be dissolved may possibly fall within the scope of the powers given by this clause. But it is not necessary to pursue this question further, because it is one thing to vary the machinery of dissolution and quite another to create a new power of altering entirely the interest of the policy-holders in the fund. The Plaintiff having the right to come to this Court to stop the waste of the assets, it appears to me that the stipulation that the liabilities of the Company shall be provided for out of the funds on any dissolution, is one which cannot be disturbed to the detriment of any policy-holder, and even if the additional resolutions are to be treated as valid, it is to be observed that they do not purport to give power to interfere with this stipulation.

I am now only dealing with the case of a policy-holder ; and if the Company had made an adequate provision for him by setting aside a proper fund or in any other way, they might have arranged their affairs as they pleased, so far as he was concerned. But they made no provision of the kind. Handing over the whole concern to another Company having extensive engagements of its own, is not making provision for liabilities. It is not enough that they find some other body willing to undertake their engage-

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 —
Judgment.

ments. What is required is some provision made by the *Argus*, not the possibility of the contract being carried out by the *Eagle*. I should, therefore, have had no hesitation in granting an injunction to restrain this transfer if it had not been already annulled; but it is another thing to grant a perpetual injunction in the wide terms in which it is asked by the prayer of the Bill. The Bill seeks to restrain any similar agreement or arrangement; and in support of this it is urged that the Company say that they still regard a transfer of some kind as a necessity. There are many subjects as to which injunctions may be granted where general words of this description would be perfectly intelligible, as for example, where a tenant for life is restrained from cutting trees of a particular kind, or any other timber of a like description. But in a case like this I cannot assume that the Company will enter into any agreement, contrary to law, now that it is ascertained what the law on the subject is. The only possible form in which an injunction to restrain future contracts could be put would be to restrain the Company from dealing with their assets otherwise than in accordance with the provisions of the deed. But this would be doing the very thing which, as the Lord Justice *Turner* says, might paralyze the Company to the prejudice of shareholders and policy-holders alike. It is of the utmost importance that policy-holders should not be allowed to interfere unnecessarily with the management of the Company, and this as much for their own sakes as for that of the shareholders. This seems to me a case of all others where a policy-holder ought to be allowed to come here only to restrain the specific injury which he would suffer from a threatened diversion of the funds from their proper objects, and it would be extremely mischievous to make a prospective order so indefinite as an injunction to restrain any dealings of a similar character. It will be enough if liberty to apply is given. The course which I shall take will be to stay proceedings in the suit, to order

the Defendants as Directors of the Company to pay the Plaintiff's costs, and this to be without prejudice to the suit of Mr. Barber's clients, or to the interim order obtained therein. The *Eagle* Company were in my opinion necessary parties; but after the abandonment of the agreement they ought to have been dismissed. They ought to pay costs up to that time, and would be entitled to receive their subsequent costs to be paid by the Plaintiff and recovered over, and they may have the option of taking the costs on this footing or of being dismissed without costs.

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KEARNS
v.
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LEAF.
Judgment.

SMITH v. ETCHES.—No. 2.

IN this case (reported ante, p. 558), the record had been ordered to be amended by making Mrs. Smith sue by a next friend. This had now been done, but the next friend was a person admittedly unable to pay costs. It also appeared that the address of the next friend had been given as of such a street, without stating the number; but this point was not pressed.

Jan. 29th.
Practice—Security for Costs
—*Baron and Feme—Effect of Co-plaintiff.*
The rule that the next friend of a married woman must either be a person of substance, or give security for costs, applies to a case where the husband of the married woman (not having any substantial interest) is a co-plaintiff. And the rule, that when you have one co-plaintiff personally liable to costs, you have no right to security as against any other co-plaintiff, does not apply to such a case.

Mr. Rolt, Q. C., and Mr. F. Morris, now moved that the next friend should give security for costs:—

They referred to *Pennington v. Alvin* (a), *Drinan v. Mannix* (b), *Stevens v. Williams* (c), *Hind v. Whitmore* (d).

Mr. H. Cadman Jones for the Plaintiff:—

There is a Plaintiff on the record who is personally liable

- (a) 1 S. & S. 264.
(b) 2 C. & L. 87.

- (c) 1 Sim. N. S. 515.
(d) 2 K. & J. 458.

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—
Argument.

for costs. It is without precedent to order one of several co-Plaintiffs to give security for costs: and in a case where one of the Plaintiffs was out of the jurisdiction, such an order has been refused: *Walker v. Easterby* (a).

The husband is a proper co-Plaintiff, this not being separate estate: *Davis v. Prout* (b), *Meddomcroft v. Campbell* (c). When this case was before your Honour on a former occasion, you virtually decided that that was so (sup. p. 559).

Mr. Rolt, in reply.—The husband has no right to be on the record as a Plaintiff: he has no interest whatever in the property. In all the cases cited, the husband had a substantial interest. Your Honour's attention was not drawn to this point on the former occasion, and there was in fact no decision on the point.

Feb. 1st.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

A point arises on the present motion, which does not seem to have been the subject of any report, though it must have frequently arisen and called for decision. This is a Bill by a bankrupt husband and his wife by her next friend against the mortgagees of the Plaintiff and the assignees of the husband, for the purpose of redeeming mortgaged real estate, the property of the wife, but not settled to her separate use. I take it to be proved, that this next friend is not in a position to be responsible for costs: there is an affidavit to that effect, which has not been answered; and it is not disputed that the next friend of a married woman, supposing her to be sole Plaintiff, must be solvent and able to answer for costs, though this is not required of the next friend of an infant;

(a) 6 Ves. 612.

(b) 7 Beav. 288.

(c) 13 Id. 184.

that is settled by Lord *St. Leonards* in the case of *Drinan v. Mannix*, and also in the case in *Simons & Stuart (a)*: and it is not displaced by the rule in allowing a married woman to sue in formâ pauperis; indeed, there seems to be all the more reason for maintaining the principle since the introduction of that rule, for if she be herself solvent, she will be able to get a solvent next friend; if not, she can sue as a pauper. But then the motion is resisted on this ground:—it is said, when you have two co-Plaintiffs one resident within, and the other beyond, the jurisdiction, you are not entitled to security for costs, because you have already one Plaintiff personally liable, and you are only entitled to the personal liability of one Plaintiff. Then, by analogy, it is argued in this case, you have the husband as a co-Plaintiff who is personally liable for costs, and therefore you are not entitled to any security from the next friend. To this it is replied, that the husband really has no right to be a co-Plaintiff at all, and that before the change in the practice the misjoinder might have been pleaded in abatement; and it is urged that such misjoinder ought not to have any operation in favour of the Plaintiffs.

I take the rule of practice to be this: if the husband has such an interest as could properly support a suit, supposing his co-Plaintiff to be any ordinary stranger, then the fact that his wife is co-Plaintiff by her next friend constitutes no objection to his maintaining his suit; but he has no right to join as co-Plaintiff when he has no interest, and ought not to be a party at all, except for conformity.

In this case the circumstances are singular: when the case was before me on the former occasion, I decided that the husband had a shadow of right, such as to render it not improper that the suit should proceed, he being a party on the record; and therefore I thought that, although as regarded any personal enjoyment, that would have passed to

(a) *Pennington v. Alvin*, ubi. sup.

1864.
SMITH
v.
ETCHES.
Judgment.

1864.
 SMITH
 v.
 ETCHES.
 —
Judgment.

his assignees, still they would not get possession at once on account of the wife's interest in equity, and the right of the husband in the interim constituted a quasi interest in the suit, sufficient to make it not so improper that he should be a co-Plaintiff as to enable the Defendants to rely on that circumstance as an objection to the frame of the suit: still, I am clear that he never could have maintained the suit alone: there was just enough to let me say the Bill ought not to be dismissed. This makes the case very like that of *Drinan v. Mannix* (a), before Lord *St. Leonards*, where the next friend of a married woman was required to give security for costs, though he was also next friend of infant co-Plaintiffs, because the married woman could not have come alone without a solvent next friend: indeed, that case seems stronger than the present one, because this suit is in substance the suit of the wife, and the estate is sworn to be an insufficient security for the mortgage: (had that not been so, I should have refused the motion, leaving the Defendant to indemnify himself out of his security).

[*Mr. Daniel.*—The affidavit was found in Chambers to be insufficient; but for that we would have answered it, and denied this among other allegations therein.]

The VICE-CHANCELLOR.—The case has now been argued here, and I must dispose of it upon the materials I have; you are too late, after judgment, to ask for time to file a further affidavit. There must be the usual order staying proceedings till security for costs has been given.

(a) *Ubi sup.*

1864.

March 10th.

Practice — Co-plaintiff — Conduct of Cause.

When one of two co-plaintiffs refuses to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining Plaintiff to apply in chambers for the sole conduct of the cause on a summons taken out in person against the refusing Plaintiff only; and a motion to strike out the name of the refusing party as Plaintiff and make him a Defendant will be refused.

BUTLIN v. ARNOLD.

IN this case the solicitor on the record had recently taken holy orders, and there was, therefore, now no solicitor on the record, and it was impossible to proceed without one. Two of the co-Plaintiffs, however, refused to concur in the appointment of a new solicitor, or to take any steps whatever in the cause, although frequently applied to by their co-Plaintiffs for the purpose.

Mr. *Eddis*, on behalf of the Plaintiffs who were anxious to go on, now moved for leave, under these circumstances, to strike out the names of the refusing parties as Plaintiffs, and to make them Defendants.

Mr. *De Gez*, for the Defendants, opposed the motion :—

The only reported case upon the point is *Wedderburn v. Wedderburn (a)*, where a similar motion was refused with costs.

The VICE-CHANCELLOR said, that he could not strike out the name of a Plaintiff, so as to deprive the Defendants of their possible right to costs against him; but he thought that the proper course for Mr. *Eddis's* clients to take was, to take out a summons in Chambers, assuming to be acting in person, and asking that they should have the sole conduct of the cause; that summons must be served on the refusing Plaintiffs, but need not be served on the Defendants. If the refusing Plaintiffs did not thereupon take some step, there would be no difficulty in making an order in Chambers which would enable the remaining Plaintiffs to go on with the cause.

(a) 17 Beav. 158.

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March 15-18.
Insurance—
Suicide—As-
signment of
Policy.

Where a policy of assurance contains the usual condition, that it shall be void in case the assured die by his own hand, "except to the extent of any interest acquired therein by actual assignment for valuable consideration," and the assured mortgages the policy along with other property for a sum much less than the total value of the mortgaged property, but exceeding the amount secured by the policy, and afterwards dies by his own hand, not feloniously, the Company have no equity against either the property comprised in the mortgage or the estate of the assured.

The principle of marshalling securities does not apply to such a case; and the assured and the Company do not stand in the relative position of principal and surety.

Semble:—that if the mortgagor's representative had redeemed the mortgage aliunde, he would be entitled to recover on the policy for the benefit of the mortgagor's estate.

THE SOLICITORS AND GENERAL LIFE ASSURANCE SOCIETY (REGISTERED) v. LAMB.

ON the 7th of September, 1853, *Frederick Lamb*, late of *March*, in the *Isle of Ely*, farmer and grazier, deceased, effected with the Plaintiffs' Company a policy of assurance on his own life for the sum of £1000.

The policy contained (among other conditions indorsed thereon), the following condition:—

4. "That if any person who has assured his own life shall die by duelling or by his own act, whether felonious or not, or by the hands of justice, this policy shall become void, except to the extent of any interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money, upon satisfactory proof to the Board of Directors of the existence and extent of such interest. But, in case the assured continue to be the holder of the policy up to the time of his decease, the Directors may, if they think fit, pay or allow for the benefit of his family any sum not exceeding the amount the society would have paid to the assured for the purchase of his interest in the policy on the day of his death."

On the 23rd of September, 1853, *Lamb* assigned this policy, together with other property, to one *Ridgway*, by way of mortgage, to secure the repayment of £7000, and interest.

On the 29th of December, 1853, *Lamb* effected a similar policy with the Plaintiffs' Company for £500.

On the 28th of November, 1854, *Lamb* mortgaged this policy also to *Ridgway*; and by the mortgage deed then

executed, all the securities comprised in both mortgages were made one consolidated security for the repayment of the said sum of £7000 and a further advance of £1000 and interest.

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Subsequent deeds of further charges were duly executed by *Lamb* in favour of *Ridgway* and persons named *Wire & Dawbarn*; and the result of all the mortgages was, that these policies, together with other property of considerable value, were charged with £8700 and interest in favour of *Ridgway*, and were also liable to *Wire & Dawbarn* as an indemnity against any loss which they might sustain in respect of a certain promissory note for £2200, given by them and *Lamb* to the *National Provincial Bank of England*, in which they had joined as sureties only.

On the 8th of February, 1861, *Lamb* committed suicide during a fit of temporary insanity; the Defendant was his residuary legatee and sole executrix.

Messrs. *Wire & Dawbarn*, on behalf of the mortgagees *Ridgway*, brought an action on the policies in the name of the Defendant against the Company, to which the Company pleaded the suicide, and the Plaintiff replied by setting up the mortgages.

Thereupon, Messrs. *Galsworthy*, the solicitors of the Company, wrote and sent to *Wire & Dawbarn* the following letter:—

“12, Old Jewry Chambers, Old Jewry, E.C.

“30th April, 1862.

Solicitors' Office ats. Lamb Executrix.

“DEAR SIRS.—In this case our clients conceive, that inasmuch as the assured died by his own act the policies are void except to the extent of any interest acquired by assignment; but that they are entitled to the benefit of any such assignment if other property be included therein.

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"The securities referred to in the replication included property of very considerable amount in addition to the policies, and it is intended by the Society to have the questions decided by a Bill in Equity, to which all necessary persons will be parties; but these proceedings will necessarily occupy time, and it is not the wish or intention of our clients to keep the mortgagees out of the moneys claimed upon the policies until the questions are determined, but merely to take measures that, subject to the mortgage securities, our clients may stand, as against the surplus of such securities and other the real and personal estate of the late Mr. *Lamb*, to the extent of the policy moneys, in place of the mortgagees. Our clients are therefore quite willing, with the concurrence of the Plaintiff in this action, at once to pay to the mortgagees referred to in the replication the amount of the policy moneys towards the discharge of the mortgages, and if that offer be accepted, we must request the mortgagees not to hand over or otherwise part with the securities or either of them, or any of the title deeds or documents relating to the property included in their securities, to the real or personal representatives of the late Mr. *Lamb* until the questions at issue are disposed of. We should be glad to be informed of the amount that will be due on the securities when the policies are paid, and also the nature and value of the property (other than the policies) comprised in the mortgages. We address this to you as you appear to be concerned for the Plaintiff and the mortgagees, and the offer here made, if accepted, will we presume put an end to the action; but of course it is made without prejudice to any proceedings we may take for determining the rights of the parties in equity."

"We are, Dear Sirs, yours faithfully,

"J. & W. GALSWORTHY.

"Messrs. *Wire & Dawbarn*."

In reply to this letter the Defendants' solicitors wrote as follows:—

" March, June 2nd, 1862.

" *Lamb Executrix v. Solicitors and General Assurance Office.*

" DEAR SIRs,—A press of parliamentary and other urgent business has prevented our replying to yours of the 30th April until now. The mortgagee will not object to receive the money, nor will the Plaintiff object to his doing so; but we cannot advise either of these parties to enter into any fresh agreement by which their equitable position or rights may be altered, and therefore the most we can do is to advise the mortgagee to hold the title-deeds until his principal and interest are paid. How can he insist upon holding the deeds until the questions at issue are determined, or prevent the mortgagor [in the Bill inaccurately printed *mortgagee*] from redeeming? We receive yours, as you will accept this, without prejudice,

And are yours truly,

WIRE & DAWBARN.

Messrs. J. & W. Galsworthy.

On the 26th of August, 1862, the Company paid *Ridgway* the sums due on the policies. This payment was made with the privity and consent of the Defendant and *Wire & Dawbarn*. Under these circumstances the Plaintiffs claimed:—

1. That, subject to the principal and interest still due to *Ridgway* in respect of his mortgage (and to *Wire & Dawbarn*, if anything), they are entitled to a charge upon all the other property comprised in the securities, to the amount of the policy moneys, and interest at four per cent. from the 26th of August, 1862.

2. If not so entitled, then that the mortgage debts should be apportioned upon all the securities, and that they

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ought to have a charge on all the other mortgaged premises for the sums, &c., to be apportioned upon them.

3. That whatever sum they were entitled to should be raised by a sale of the mortgaged premises; and if such premises were insufficient, then that they should stand as creditors against the general estate of *Lamb* in respect of the deficiency.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Surrage*, for the Plaintiffs:—

The object of the condition was, that the insurer should have no interest in case of suicide; but as that would render any policy unmarketable, it is provided that an assignee should be indemnified to the extent of his interest, *as it stands in a Court of Equity*.

The case does not seem to have arisen, because cases of suicide are generally also cases of insolvency; but the principles of equity give us a right to stand in the shoes of the mortgagor, whose policy has become void as between himself and us: *Cook v. Black (a)*.

The case is like a mortgage of *Blackacre* and *Whiteacre* to secure *A.*'s debt, *A.* having no right in *Blackacre* except for this specific purpose. If the mortgagee choose to realise his security out of *Blackacre*, the owner of that property would have a right to be indemnified out of *Whiteacre*.

Mr. *Giffard*, Q. C., and Mr. *Morgan* for the Defendants:—

This is not a contract of indemnity. A specific sum is contracted to be paid on certain conditions, with a defeasance of the bond in a certain event, namely, the death of the assured by suicide without having assigned the policy, which has not happened: *Dalby v. Indix and London*

(a) 1 Hare, 390.

Assurance Company (a), Law v. Indisputable Life Policy Company (b); Fauntleroy's case (c), which afterwards went to the House of Lords, turned eventually on questions of public policy; the House thought it improper that any one should have a benefit by the execution of a felon. That is not applicable to this case, for the death has been found not to be felonious. We do not say what might be the result if there was any fraud in the case, but none is suggested; and such suggestion, if made, would have been groundless.

Suppose the assured had sold the policy out and out, and this suicide had taken place next day, could the Company have followed the purchase-money into the hands of his representatives? Or suppose the mortgagee had sold under his power of sale, and paid the surplus of the purchase-moneys to the assured, who had afterwards committed suicide, could the Company have filed a Bill for the purpose of having his assets marshalled in their favour? Or again, if the mortgagee had so sold after the suicide, could they have maintained a suit to prevent him from paying the surplus over to the representatives of his mortgagor.

The VICE-CHANCELLOR.—Suppose you had redeemed the mortgage, could you have recovered on the policy?

Mr. Giffard.—Yes, if the redemption took place after the death of the assured.

There is no element of principal and surety in this case. It is simply an exception, partly for the benefit of third parties, and partly for the advantage of the assured, out of the general condition defeating the policy. The case of *Cook v. Black*, which was cited for the Plaintiffs, shews that the primary object of the clause in question is to make the policy marketable, which it would not be if it

(a) 2 Sm. L. C. 213; s. c. 15 C. B. 365. (b) 1 K. & J. 223.

(c) *Bolland v. Disney*, 3 Russ. 351: reversed in Dom. Proc. 2 Dow, & Cl. 1.

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was defeasible under circumstances within the power of the assignor, over which the assignee would have no control.

This is a mere question of the construction of this contract, and it is to be construed most strongly against the grantors: *Dufaur v. Professional Life Assurance Company (a)*, *Notman v. Anchor Insurance Company (b)*.

The VICE-CHANCELLOR.—What is meant by “to the extent of any interest acquired therein?” What do you say is the measure of the extent of the interest?

Mr. Morgan.—The amount secured by the mortgage. If that exceeds the amount payable on the policy, then the interest is in the whole; but if not, then the Company are to pay off the mortgage and nothing more.

This Bill is simply an attempt to create a new sort of marshalling.

Mr. Rolt in reply:—

There is no contract on the part of the Company to pay the assignee. The contract is with the assured: “We will pay you if you don’t commit suicide, &c.; and if you do, though the contract as between us is to be void, still we will act upon it, so far as may be necessary to enable you to carry out engagements made with third parties for value in respect thereof.”

The Defendants are placed in this dilemma: Supposing the mortgagee to have elected to enforce his security upon the real estate, leaving this policy untouched; then, on the supposition that they are right, either the Defendants would have been entitled to recover against us for the benefit of the suicide’s estate, contrary to the contract; or, the mutual rights of the parties to this contract would have been variable at the arbitrary will of a stranger, which is absurd.

(a) 25 Beav. 599.

(b) 4 Jur. N. S. 712.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question raised in this case is one which has not been distinctly determined heretofore. The circumstances are as follows :—

A policy of assurance was effected by the Defendant's testator with the Plaintiffs, containing the following condition as part of the terms on which it was granted. [His Honour read it: see ante, p. 716.] This policy (along with another, in respect to which the circumstances are precisely similar,) has been twice mortgaged; but it is only necessary to consider one of these mortgages,—that to *Ridgway*,—as the liability upon the other has been satisfied. *Ridgway's* was a mortgage for £8000, the whole amount secured by the policies being £1500 merely; but his security also comprised a much larger property of *Lamb's*; and I take it to be admitted, for the purposes of this suit, that the security is ample and will yield a surplus.

After the death of the assured, an action was brought on the policy, in the name, of course, of his representative, but at the instance of the mortgagee; and then the Company, seeing that it was obvious that they had no legal defence to the action, caused the following letter to be written: [His Honour read the letter of Messrs. *Galsworthy*, supra, p. 717.] To this letter the following reply was sent: [His Honour read it, see supra, p. 719.] It is somewhat important to read both these letters, because there was some sort of attempt to set up an agreement on the part of the mortgagee to the course suggested by the Company; but in fact there was no agreement of any kind, the Defendants merely say, "pay the money, and of course the action will stop: you must take your own course as to that:" and accordingly they did take their own course, and paid the money with the knowledge and concurrence of all parties.

In this state of things two questions arise :—

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First. What would be the position of the parties on the supposition that nothing had been done since the commencement of the action?

Secondly. How far has that position been affected by what has since taken place?

This Bill has been filed for the purpose of asserting a claim of this nature: [His Honour read the claim set up by the prayer of the Bill, see *supra*, p. 719.]

It is impossible to consider the first part of this case apart from the second, which seems to throw considerable light upon it; for I think that the Plaintiffs cannot sustain their claim to marshal the security against the mortgagor, unless they would also be entitled to recover against his personal assets everything which they might have to pay to the mortgagee.

This case turns on the express terms of the contract between the parties. The policy is to be void except under certain circumstances and to a certain extent. Then it must be proved what that extent is, and be ascertained what is the exact amount assured, *i. e.* what is the value of the bond.

The condition says, that if the bond be in the hands of an assignee for value, it is to be valid for its whole amount; but if of a mortgagee, then only to the extent of the interest of the mortgagee: and the object of this exception out of the operation of the clause for avoiding the bond forms an important element in the answer to this question. Was it an exception in favour of the mortgagee merely, or was it intended for the benefit of the assured? The judgment of Vice-Chancellor *Wigram* in the case cited at the bar, seems to settle this point. He says (p. 393), "the meaning of the condition" (a condition not precisely similar to the present,

but somewhat more favourable to the contention of the Plaintiffs,) "is that the assured shall have the power of assigning the policy so effectually, that a person advancing money upon it shall retain his security unimpaired, notwithstanding the assured might commit suicide; and by this condition the policy is rendered more valuable as a negotiable security." The object, therefore, is to increase the value of the policy to the holder, *i. e.* in the first place, to the assured. And if that be so, I do not see how I can hold that, in the absence of fraud, the estate of the assured is to be deprived of the benefit intended to be given him by the exception, merely because the mortgagee happens to be fully secured.

Suppose this had been a complete assignment of the whole policy; in that case it is admitted that there would have been no equity to recover the purchase money from the estate of the assured: or suppose it mortgaged to its full value, which might happen in a variety of ways, with or without an accompanying covenant to pay principal and interest, is it to be left in the power of the mortgagee to determine whether it is or not to become void?

But then an equity of this description is relied on: The Company say, "True, this is a good policy in the hands of the mortgagee; but he must be thrown in the first instance upon the covenant of the mortgagor or his common law right as a creditor (as the case may be), and can only touch the policy when his other remedies are exhausted. This amounts to a claim of right to recover back from the assured anything which might be paid to the mortgagee.

But how is that consistent with the benefit to the mortgagor, which is contemplated by this exception? He has no anticipation of the calamity which is about to befall him, (for I of course exclude the case of fraud,) and he is entitled to consider that he has provided for this debt, and to make all his arrangements accordingly; but if this debt be afterwards thrown upon his estate, as the Company

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contend it ought to be, all his plans are defeated, and it would be impossible for any person prudently to take such policies into account when settling his affairs; and yet they not unfrequently form a large part of his property.

The next stage is the exact case before the Court; where the policy is holden along with other securities, and you have to arrive, in the construction of the contract, at the extent of interest acquired by the security. *Primâ facie* the mortgagee has acquired the whole interest; but then you have to determine what is the extent to which the bond stands good; and to do this you must look at the circumstances as they stood at the time of the death, and I do not think that anything which might happen after that time would materially affect the position of the parties.

If this were to be looked upon as a case of suretyship the result would be very different; because then the Company, as sureties, would, upon payment of the debt, be entitled to a transfer of the securities; but I do not take that view of the rights of the parties. The Company are not sureties for the mortgagor, but principal debtors, the extent of whose liability is to be determined by the terms of this contract. It is admitted, that they would be so if the policy were mortgaged to its full amount. Can it then affect the question, that it is pledged either for a sum less than its full amount, or, as here, along with other property, as part of one entire security? In each and all of these cases the mortgagor is entitled to calculate upon the surplus (if any) as part of his assets, and to treat the rest of his estate as unaffected by the debt.

This view gets rid of a consideration which at first sight presented a considerable difficulty: namely, that to hold the Plaintiffs to be wrong, would have the effect of making it depend upon the arbitrary will of the mortgagee whether the bond should be void or not: because it was said, if the mortgagee was to realise the rest of his security, or to

recover his debt from the mortgagor's estate, leaving the policy untouched, the condition would prevent the mortgagor's representative from recovering anything on the policy. But I do not think that the Court is placed in any such dilemma: I think you must consider the whole matter as settled at the expiration of the three months from proof of death which is fixed by the bond itself for the payment of the claim; at that moment the policy is either good or bad, and if bad, either in toto or to a certain limited extent; and whatever may be its state then remains fixed, and the amount (if anything) remains payable, whatever may thereafter take place.

It was pressed upon me that this question was virtually governed by the case before Vice-Chancellor *Wigram* (a), and I have therefore now to deal with that case. That was a case which at first sight was very similar to the present; but upon a little examination it appears that there was a very important distinction not only in the words of the condition attached to the policy there in question, but also in the manner in which the matter was brought before the Court.

The words in that case were, "If the person assured commit suicide, and the policy shall have been assigned to any person or persons having a *bonâ fide* interest in his life to the extent of the sum assured, the full amount will be paid to the party or parties so interested; if the interest be less than the sum assured, the party or parties will be indemnified to the full extent of such interest." The word there is 'indemnified,' which points more to a mere contract of indemnity or suretyship than the words in the case before me, where you have a bond which is to be good altogether, or to a certain extent, according to circumstances, and which, if once wholly or partially void, must remain so, so soon as you have determined to what extent (if at all) it is valid.

(a) *Cook v. Black*, ubi sup.

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Moreover, the question which was raised in that case was very different from the present: an equitable assignee of the policy filed a Bill against the Company to have it declared that his assignment was good, and to get the benefit of the indemnity provided by the condition in question; the Company said: "You must shew what it is that you are to be indemnified against," and therefore they had a right to an account for the purpose of ascertaining the amount of the Plaintiff's loss, and, of course, a right to shew what other securities he held which would be applicable in diminution of that loss.

Then comes the second point: Supposing the Plaintiffs to be right on the first question, I think their subsequent course of conduct has placed great difficulties in their way. They ought to have said to the Defendant, "You are suing upon a bond which is void except to a certain limited extent, namely, as far as the mortgagee is interested, and it is for you to make out what the extent of that interest is;" and they might then have contended at law that such interest was limited to the deficiency (if any) of the other securities. Or if it be replied, that a Court of law would look only at the amount fixed by the bond on its face, without discussing the equities arising out of the fact that there were other securities included in the mortgage, then the proper course would have been to have filed a Bill either on the footing of suretyship to redeem the mortgage, or, if they could, to have a sale of the securities, and to restrain the action at law until the other securities had been realised: instead of which the Company have paid the amount due on the policy. It is said, they paid on the terms contained in the letters which I have read. That is so; but I do not think that the letters amount to more than an offer on the one hand to pay the full amount without prejudice to any right they might have; and an answer to the effect that the mortgagee had no objec-

tion to receive his money, and that the executrix did not object (how could she?) to its being paid to him, and they say to the Company, "Take your own course; pay if you please, if not, we will go on with the action."

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Then the Company, by paying, have put themselves in this position, that they have not ascertained the value of the other securities. This should have been done before any payment had been made, because, if the Plaintiffs are right, and if the other securities are worth more than the debt, the bond is void, and nothing should have been paid on it at all.

Suppose that the bond was void on this ground, and that afterwards and before payment of the mortgage the property became greatly depreciated in value, so as to be an insufficient security for the mortgage debt; how are the equities between the parties to be ascertained and determined? or suppose the contrary case, and that at the time of the death the other security was insufficient, and the bond, therefore, good for something; and that a valuable mine had been unexpectedly discovered; what is to become of the payment which would have been made upon the bond, and when are the rights of the parties finally settled?

For all I know, not a penny was, on this view, ever payable on this policy, and the payment which has been made by the Company has been made by them as mere volunteers. I cannot sustain a Bill to enable them to recover back money voluntarily paid by them, and which may or may not have been due upon the bond.

On both grounds, therefore, I must dismiss this Bill with costs (a).

(a) The Plaintiffs appealed from this decision; and on Monday, June 13, the Lords Justices dismissed the appeal with costs.

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DAVIES v. HUGUENIN.

*May 1st, 2nd,**Power — Covenant — Release**— Younger Sons — Portions.*

Covenant by a father in his daughter's marriage settlement not to exercise a power so as to diminish her portion under the father's settlement:—

Held, a release pro tanto of the power.

A gross sum was directed to be raised after the decease of the settlor and his wife (tenants for life) for portions of children other than their eldest or only son, equally to be divided:—*Held* that the personal representatives of the eldest son, who attained twenty-one, and died in his father's lifetime, were intitled to one share.

Held also, that a daughter who attained twenty-one and died unmarried in her father's lifetime, was entitled to a share.

BY an indenture, dated the 9th of November, 1819, between *John Davies* and *Mary* his wife, of the first part, *James Meddowcroft* and *Thomas Hughes* (both since deceased) of the second part, and *George Ripley* (since deceased) of the third part. After reciting that the said *John Davies* at or soon after his intermarriage with the said *Mary* his wife had received from her uncle, the said *James Meddowcroft*, the sum of £500, and that he had lately received from the said *James Meddowcroft* the further sum of £500, with interest thereon from the time of such marriage, making together the sum of £1218, as a marriage portion given by her said uncle; and that, in consideration thereof, the said *John Davies* had agreed to settle and convey the lands and premises first thereafter described to the uses and in manner thereafter mentioned. And reciting that the said *Mary*, the wife of the said *John Davies*, under the will of her late father, would be entitled to a further legacy of £600 after the death of her mother, and that in consideration of the premises, and for making a further provision of maintenance for his said wife, and for the male issue of the marriage, and for the raising of portions and making such provision for the daughter or daughters, younger son or younger sons, of the said *John Davies* on the body of the said *Mary* his wife begotten or to be begotten as were thereafter in that behalf expressed, and for the settling of the estates of inheritance thereafter mentioned, he the said *John Davies* had consented and agreed to settle and convey as well the messuages, lands, tenements, hereditaments and premises first thereafter described, as also certain other lands also therein described, upon the trusts, and to and for the purposes thereafter declared concerning the same. The said *John Davies* released

Held also, that the second son, who, during the father's life and after attaining his majority, became the eldest son and succeeded to the settled estate, and the personal representatives of a child who died in infancy, were not entitled.

and confirmed the lands and premises therein mentioned, to hold to *Meddowcroft* and *Hughes* and their heirs, to such uses, upon such trusts, and to and for such intents and purposes, and with and under such provisos, powers, limitations, restrictions, and agreements as were thereafter limited and declared of and concerning the same, subject to certain specified incumbrances affecting part of the aforesaid lands ; that is to say, to the use of the said *John Davies* for life without impeachment of waste, with remainder to the use of the said *Mary* his wife, for her life, without impeachment of waste, with remainder to the use and behoof of such of the children of the said *John Davies* on the body of the said *Mary* his wife begotten or to be begotten, and in such parts, shares, and proportions, and under and subject to such charges, directions, limitations, and appointments as the said *John Davies*, by his last will and testament, should charge, direct, limit, or appoint, give or devise the same or any part or parts thereof, and in default thereof to the use of such of the children of the said *John Davies* by the said *Mary* his wife, and in such parts, shares, and proportions as the said *Mary*, the wife of the said *John Davies*, whether covert or sole, should by will or codicil appoint ; and for want of such appointment, to the use of the said *George Ripley*, his executors, administrators, and assigns, for the term of 500 years from thence next ensuing, upon the trusts thereafter mentioned ; and subject thereto to the use of the *James Meddowcroft* and *Thomas Hughes*, and their heirs, upon the trusts and to and for the several ends, interests, and purposes after mentioned, that is to say : to the use and behoof of the first and other sons of the said *John Davies* on the body of the said *Mary* his wife begotten or to be begotten, and in default of issue male to the daughters, equally to be divided between them as tenants in common in tail general, with cross limitations in tail general, with an ultimate limitation to the use and behoof of the right heirs of the said *Mary* the wife of the said *John Davies*,

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for ever. And the trusts of the said term of 500 years were declared to be, as soon as conveniently might be after the decease of the said *John Davies* and *Mary* his wife, and the survivor of them, in case of no such appointment as aforesaid, and in case the said *John Davies* should depart this life leaving issue by the said *Mary* his wife one son and also two or more children, either born in his lifetime or after his decease, then in trust to raise the sum of £6,000 for the portion or portions of any child or children of the said *John Davies* on the body of the said *Mary* his wife begotten or to be begotten (other than their eldest or only son), equally to be divided betwixt and amongst them if more than one, and with and subject to such further declarations, limitations, restrictions, and agreements, as were thereafter expressed concerning the aforesaid portion or portions, and the maintenance of such child or children. And the deed contained a proviso for cesser of the term on performance of the trusts.

There were eight children of the marriage, two of whom died infants before the date of the said settlement. The others of such eight children were the Defendant *Harriet Huguenin*, who was born on the 28th of October, 1810, *Lucy Margaret Davies*, who was born on the 21st of June, 1812, and died in the month of November, 1845, *William Hamblett Davies*, who was born in the year 1815, and died without issue in the month of July, 1847, the Defendant *Elizabeth Ann Davies*, who was born on the 9th of November, 1818, *John Stanley Davies*, who was born on the 12th of December, 1822, and died in the month of April, 1857, and *Thomas Davies*, who was born on the 24th of August, 1825, and died on the 10th of September in the same year.

In the year 1829, a marriage was contracted between the said *Harriet Huguenin*, then *Harriet Davies*, spinster, and *William Meddowcroft*, since deceased.

Marriage articles, dated the 12th of April, 1829, were entered into between the said *William Meddowcroft* of the first part, the said *Harriet Davies*, then a spinster, of the age of nineteen years, of the second part, the said *Mary Davies* of the third part, and the said *John Davies* of the fourth part; and thereby, in consideration of the intended marriage and of the settlement thereafter agreed to be made by and on the part of the said *John Davies* immediately after the solemnisation of the said intended marriage to the said *William Meddowcroft*, he the said *William Meddowcroft* covenanted to settle certain property to which he was or might become entitled as therein mentioned, upon the trusts therein mentioned; and the said *William Meddowcroft* and *Harriet Davies* covenanted to settle all the future property of the said *Harriet Davies*, including the moneys secured by the covenant thereafter contained by *John Davies*; and the said *John Davies* covenanted with *Meddowcroft*, that he and the said *Mary* his wife, in consideration of the premises, would not execute any appointment, or do any act to defeat, lessen, or diminish the share and interest to which the said *Harriet Davies*, as the daughter of the said *John* and *Mary Davies*, was or might become entitled on the decease of the said *John Davies* and *Mary* his wife, in the pecuniary division or portion made and secured for the only daughter, or for the younger son and sons and daughter or daughters, as the case might be, of the said *John Davies* by the said *Mary* his wife, under and by virtue of the said settlement of the 9th of November, 1819; but on the contrary, that he the said *John Davies* should and would, when thereunto requested, make, do, and execute all such acts and deeds as might be requisite for confirming and establishing such share, right, and interest of the said *Harriet Davies* in the said pecuniary provision or portion, so as the said *Harriet Davies* should receive for her share and proportion of the said settled property the sum of £1500 at the least."

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On the 7th of October, 1840, *Harriet Meddowcroft* married her second husband, the Defendant *Louis Huguenin*.

By his will, dated the 26th of April, 1852, reciting the settlement of November, 1819, *John Davies* appointed his residuary real estate to trustees, upon trust for his wife for life, with remainder for the sole use and benefit of his son *John Stanley Davies* in fee, charged with £3000 for the benefit of his daughter the Defendant *Elizabeth Ann Davies*, and £1000 for the benefit of his daughter *Harriet Huguenin*, whose advancement on her first marriage and subsequently, with interest, would (as the will stated) bring up her share, according to the testator's estimate, as near as might be equal to that of her unportioned sister; and the testator directed the said sums of £3000 and £1000 to be invested, the income to be for the separate use of the daughters respectively, and the principal to be at their disposal by will or otherwise, but so that the appointment by *Harriet Huguenin* should be limited to revert to her own family at her decease; and in default of appointment, and as to the residue of the testator's estate and effects, the testator appointed the same to his wife for life, remainder equally among his children and grandchildren, the grandchildren taking their parent's share.

By a codicil, dated the 23rd of July, 1853, the testator, after reciting that his daughter *Harriet* and her present husband, or one of them, was indebted to him in a large sum of money amounting to several hundred pounds and interest, gave and released to his daughter all sums due from her or her husband, and declared and appointed that the provision in his will and this codicil in favour of his daughter *Harriet* was to be taken by her in full satisfaction and discharge of all claims and demands of his said daughter and her husband; and if not so accepted, the said gift and release of the said debt, and the whole of the pro-

visions of his will and codicil in favour of his daughter *Harriet* were to be void and fall into the residue.

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The testator died on the 30th of August, 1853, and the will and codicil were proved by the widow and the Defendant *Elizabeth Ann Davies*, the executrixes therein named.

The testator left three only of his children surviving, viz. *John Stanley Davies*, *Elizabeth Ann Davies*, and *Harriet Huguenin*.

John Stanley Davies died in the month of April, 1857, leaving his widow and two infant children (the Plaintiffs in this suit) him surviving, having by his will given all his real and personal estate to his wife and two other trustees upon trusts for the benefit of his wife and children. The widow alone acted in the trusts, and proved the will.

Mary Davies, the widow of *John Davies*, died on the 10th of April, 1862, having devised all her real and personal estate to *Elizabeth Ann Davies*, and appointed her sole executrix. She proved the will.

Mr. *Huguenin*, by a post-nuptial settlement, dated the 24th of August, 1861, settled the £1000 appointed by the will of *John Davies*, describing it as "the sum of £1000 to which Mrs. *Huguenin* was entitled under the will, irrespective of what she or her husband in her right might be entitled to under the covenant in the articles of September, 1829." Mrs. *Huguenin* joined in this settlement, but the deed was not acknowledged by her.

The Defendants *Louis* and *Harriet Huguenin* contended that the appointment by the will of *John Davies* was bad, to the extent to which it diminished the portion coming to *Harriet* contrary to the covenant in the settlement of September, 1829.

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The Plaintiffs insisted that the testamentary appointment was good in any case; and further, that the portion of Mrs. *Huguenin* was not in fact reduced below the amount which would have come to her in default of appointment under the settlement of November, 1819, because the sum of £6000 would have been divisible among all the children living at or after the date of the said settlement, except *William Hamblett*, the then eldest son, and that each share would have been one-fifth or £1200, of which £200 had been satisfied to Mrs. *Huguenin* by advancements by *John Davies* in his lifetime to her and her husband.

The Bill was accordingly filed, to have the rights of all parties declared, and the settlement of November, 1819, carried into execution.

Argument.

Mr. *Giffard*, Q. C., and Mr. *Kay*, for the Plaintiffs:—

1. The covenant by *John Davies* in the settlement of September, 1829, did not operate as a release of the power given by the settlement of November, 1819. The covenant clearly cannot be read as an execution of the power, nor is it in terms a release of it. It is merely a contract upon which there may be a remedy on the covenant against the estate of *John Davies*; but it does not operate, or purport to operate, in any way upon the property subject to the power.

2. Even if the covenant did so operate, it is satisfied in the event. At the date of the settlement of 1819, there were six children living, all of whom (except the eldest son *William*, who has since died,) acquired a vested interest in the £6000 in default of appointment. The share of Mr. *Huguenin* was therefore £1200 only, and that amount has been satisfied to Mrs. *Huguenin* by the advancement and the appointment by the testator's will.

The death of some of the children during the life of *John Davies* does not affect the division, because they had all acquired a vested interest subject to the power. The direction for raising the £6000 is, that it is to be raised only if there should be any younger children living at the decease of the parents; but this condition having been satisfied the money is raiseable, and then the distribution is to be not among such of the younger children as should survive the parents, but among all the children except the eldest son. The gift being vested immediately, the time for ascertaining the class was the date of the settlement itself, and the fund was therefore divisible into fifths: *Powis v. Burdett* (a), *King v. Hake* (b), *Perfect v. Curzon* (c), *Adams v. Beck* (d), *Sandeman v. Mackenzie* (e), *Torres v. Franco* (f).

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Mr. James, Q.C., and Mr. North, for *Elizabeth Ann Davies*, in the same interest as the Plaintiffs:—

Even if such a covenant could be held to be an equitable release of a power in the covenantor alone, it cannot release a power which is to be exercised by the covenantor, or failing him by the wife. The husband having made an appointment, the wife who survived let the property pass on the assumption, which we say was well founded, that nothing remained subject to her power. Moreover, the Defendants, Mr. and Mrs. *Huguenin*, have accepted the benefits given by the will, and cannot now claim in opposition to it.

Mr. Rolt, Q.C., and Mr. C. T. Simpson, for Mr. and Mrs. *Huguenin*:—

The covenant is clearly a release, pro tanto, of the power. A man cannot exercise a power in a manner inconsistent

(a) 9 Ves. 428.

(d) 25 Beav. 648.

(b) Id. 438.

(e) 1 J. & H. 613.

(c) 5 Madd. 442.

(f) 1 R. & M. 649.

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with an express covenant: *Green v. Green* (a), *Horner v. Swann* (b), *Re Chambers* (c), *Hurst v. Hurst* (d). It is in fact too clear for argument, that the donee of a testamentary power may bind himself not to exercise it.

That being so, the only question is, whether the testamentary appointment is or is not inconsistent with the covenant. The covenant is not to diminish the share to which *Harriet* was or might be entitled, on the decease of her parents, in the portion secured for daughters and younger sons. What would that share have been but for this testamentary appointment?

The primary rule is, that where no time of vesting is specified (as is the case here), sums charged are not to be raised unless there is, at the time of raising and dividing the fund, some person in esse who is entitled to take. It is true that certain exceptions have been admitted in the case of portions, but only to this extent, that a child who marries and requires a portion, is not to lose it by dying before the expiration of the previous life estate. Any child, to establish a title under this principle, must show that he required the portion; and it seems to be settled that nothing less than marriage will be considered as sufficient to show that the child required the portion during the parent's life: *Poulet v. Poulet* (e), *Bruen v. Bruen* (f), *Jennings v. Looks* (g), *Hubert v. Parsons* (h), *Warr v. Warr* (i), *Teynham v. Webb* (k).

Then how could *Thomas Davies*, who died at the age of one month, in 1825, be said to have required a portion? To give it to him would be to give it to his father the settlor.

(a) 2 J. & Lat. 529.

(b) T. & R. 430.

(c) 11 Ir. Eq. R. 518.

(d) 16 Beav. 372.

(e) 1 Vern. 204, 321.

(f) 2 Vern. 439.

(g) 2 P. Wms. 276.

(h) 2 Ves. sen. 261.

(i) Prec. Ch. 213.

(k) 2 Ves. sen. 197, 209.

Lord Hinchinbroke v. Seymour (a) is a remarkable case upon this point, for there an appointment to a son at the age of fourteen was held bad, because he could not require a portion at that early age. All the authorities were discussed in *Edgeworth v. Edgeworth* (b), and the result is, that there are no decisions holding that a child can require a portion except on marriage, though it is true that there are some dicta suggesting that he might be held to do so on attaining the age of twenty-one. Whatever doubt there may be thought to be on this point, it is quite settled that a child who dies unmarried under twenty-one does not require a portion : *Remnant v. Hood* (c). Therefore *Thomas* is excluded because he died in infancy ; *Lucy Margaret* is also excluded, as never having been married ; *William Hamblett* was the eldest son at the time of the settlement ; and *John Stanley* is also excluded by subsequently becoming an eldest son : *Chadwick v. Doleman* (d), *Richards v. Richards* (e).

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The VICE-CHANCELLOR.—What I held in that case was, that becoming an eldest son before the period of vesting would exclude. But *William* died in 1847, after *John Stanley* had attained twenty-one. It will be argued that the portion vested subject to the operation of the power.

Mr. *Simpson*.—If so, it could only be vested subject to divesting by the birth of another child, or by the acquisition of the character of eldest son.

As for the argument that Mrs *Huguenin* has barred her claim by settling the £1000, it is a sufficient answer, if there were otherwise any ground for the contention, that she never acknowledged the deed.

The VICE-CHANCELLOR intimated that *Lucy Margaret* was not excluded.

(a) 1 B. C. C. 395.

(d) 2 Vern. 528.

(b) Beat. 328.

(e) Johns. 754, 765.

(c) 2 De G. F. & J. 396.

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Mr. *Giffard*, in reply :—

The question, therefore, resolves itself into this : whether Mrs. *Huguenin's* share is a third, a fourth, or a fifth—that is, £2000, £1500, or £1200. Now, as to *William Hamblett*, he never came into possession as eldest son, and, notwithstanding the conditions of the settlement, would be entitled to share as a younger son : *Ellison v. Thomas* (a). In any case the shares of survivors are not increased by the death of children for whom portions are intended : *Evans v. Scott* (b).

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VICE-CHANCELLOR SIR W. PAGE WOOD :—

In this case the main question that was argued was, what, in the events that have happened, was the extent of the share which the Defendant *Harriet Huguenin* would have taken in default of appointment out of a sum of £6000 directed, by a post-nuptial settlement executed by her father, to be raised for portions of the settlor's younger children. The limitations in the settlement were to the settlor and his wife successively for life, then to the children as the settlor, or in default of appointment by him as his wife, should appoint, and subject to these powers to a trustee for a term of 500 years, with remainder to the first and other sons in tail, remainder to the daughters as tenants in common in tail. The trusts of the term were, if there should be no appointment, and in case the survivor of the settlor and his wife should leave one son, and two or more children surviving them, then to raise the sum of £6000 for the portion or portions of any child or children of the settlor by his said wife (other than their eldest or only son), equally to be divided betwixt and amongst them, if more

(a) 1 De G. J. & S. 18.

(b) 1 H. L. Cas. 43.

than one, and "with and subject to such further declarations as were thereafter expressed concerning the aforesaid portion or portions, and the maintenance of such child or children."

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It is singular that no such further provisions are thereafter expressed at all, and this clause becomes simply nugatory.

This settlement was executed in 1819, and in 1829 articles were entered into on the marriage of the original settlor's daughter *Harriet* (now the Defendant Mrs. *Huguenin*) with her first husband *William Meddowcroft*. By that deed the settlor covenanted that he and his wife would not execute any appointment to defeat, lessen, or diminish the share of *Harriet* in the pecuniary division or portion made and secured for the only daughter, or the younger son or sons and the daughter or daughters of the settlor and his wife under the settlement of 1819, but on the contrary would do all acts that might be requisite to confirm and establish such share, so as she should receive £1500 at the least.

The state of the family was this: There had been two children, who were dead at the date of the settlement of 1819, and who must, therefore, be put out of consideration altogether. Of the six remaining children, one died in infancy. Another, the eldest son *William*, lived to attain the age of twenty-one, but died without issue in his father's lifetime. A third, *Lucy*, also attained the age of twenty-one, and died unmarried in her father's lifetime. At the death of the settlor, which occurred in 1853, there were three surviving children, *John Stanley*, the only surviving son, and the Defendants, Mrs. *Huguenin* and *Elizabeth Davies*.

It is almost too clear for argument (though the point was raised), that the covenant by the father operated pro

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tanto as a release of his power; and the question is, what would have been the amount of Mrs. *Huguenin's* share in the £6000 in default of appointment?

The father, *John Davies*, by his will, appointed his whole property to his surviving son *John Stanley*, charged with £3000 to *Elizabeth*, and £1000 to Mrs. *Huguenin*; and by a codicil released certain alleged debts in favour of Mrs. *Huguenin*. The question is, whether, under the circumstances I have stated, she is entitled to claim any larger sum. The only material points to be determined are these: First, did any share vest in the child who died in infancy? Secondly, what was the interest of the eldest son, who died before he came into possession of the estate? Thirdly, what was the interest of the second son, who came into possession as the eldest surviving son?

As to this second son, *John Stanley*, the authority of *Chadwick v. Doleman* appears to me completely to cover the case. He became an eldest son during the father's life, and took the estate under the limitations in tail, and so taking the estate must be treated as disentitled to any portion in the character of a younger son.

The case of the eldest son *William* seems to be governed by the recent decision of the Lord Chancellor in *Ellison v. Thomas*, where it was held that the representatives of an eldest son who attained twenty-one, and died before the period of distribution, never having become entitled in possession to the estate, took a share in portions given to younger sons. I am not aware of any other case in which a share of portions has been given to a son who died filling the character of an eldest son before the period of distribution, though there are decisions to the effect that an eldest son who does not take the estate shall rank as a younger son. *Ellison v. Thomas* is however conclusive on the point.

As to the daughter *Lucy*, it is true that the settlement does not specify the attainment of any age as a condition of taking a portion; but I think that the interest must be taken to vest at latest on attaining the age of twenty-one. *Lucy* did attain twenty-one, and I must hold that she acquired a vested interest in her share of the portion fund.

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The point as to the child who died in infancy is not covered by express decision; but in *Remnant v. Hood*, I find a strong intimation of opinion by the Lord Justice *Turner*. His Lordship observes, that the Court takes upon itself the right to construe limitations of this character in a settlement with reference to the intent of the instrument, and in some cases almost in opposition to the words, which are held to be overridden by the plain and manifest purpose of the instrument, of which general doctrine the case of *Chadwick v. Doleman* is one of the most striking examples. On this particular question of portions, it was very early settled, that the Court would act upon this principle of interpretation, and would construe limitations of portions in such a way as to provide that they should be raised *qua* portions, at such time and in such manner as they might be required.

One of the earliest of this general class of authorities is *Poulet v. Poulet*; and in most of the subsequent cases between the heir and persons claiming portions, even though the portions may have been in a sense vested, the Court has refused to allow them to be raised, unless the circumstances were such that the portions were required.

The length to which this doctrine has been carried is very remarkable. In *King v. Withers* (a) a portion was limited in this way: If the son should die without issue male of his body then living or afterwards born, the

(a) Cas. t. Talb. 117 (a).

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daughter was to receive at twenty-one or marriage £3500, but in case the contingency of the son dying should not happen before the said age or marriage of the daughter, then she was to receive the said sum whenever it might after happen, and the sum was charged upon lands devised to the son in tail.

The father died, the daughter attained twenty-one, married, and died in the lifetime of her brother, who afterwards died without issue male, and it was held that the portion was raiseable: Lord *Talbot's* observations (p. 123) are very much to the point: "Indeed, in cases where the child dies so young that the portion would never be wanted, the Court will not decree it to be raised, because there is no occasion for it, as in *Brewin v. Brewin's case*" (a).

I mention this case specially, because Lord *Talbot* refers with approval to *Brewin v. Brewin* in *Vernon*, but better reported in the *Precedents in Chancery*, 195. There a term was created by marriage settlement, for the purpose of raising £3000, to be equally divided among daughters within a year after the death of the surviving parent. There being one daughter, the father by his will devised the trust estates to make good his wife's portion, and to raise £3000 for his daughter's portion, and died. The daughter afterwards died at the age of five years, and the Lord Keeper said, "If it had been a personal legacy, it must have been paid, and that presently, though the child dies before the appointed day; or as a devise out of land by the will, though no time of payment limited." It does not seem to have been argued that the daughter took two portions. Then the Lord Keeper proceeds: "Here the will is relative to the settlement, and both make but one security; and by the will the portion should have been raised in a

(a) 2 Vern. 439.

reasonable time when the child came to want it, but not presently, though she should have had reasonable maintenance. In the meantime, it is within the rule of all the previous cases. In case of a personal legacy payable at twenty-one or marriage, I think the Court always appointed maintenance out of the interest of it, but not if expressly limited otherwise in the meantime ;” and the report continues “the Bill was dismissed by the Master of the Rolls, and affirmed on appeal ; but the land was charged with 100 marks per annum maintenance for the child whilst it lived” (a).

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In *Remnant v. Hood*, the same point arose, but was not argued, because neither side was desirous of raising it. And Lord Justice *Knight Bruce*, without giving any opinion upon it, said that he was not satisfied that neither of the daughters who died in his lifetime infants and unmarried, acquired a vested interest. Lord Justice *Turner*, on the other hand, says : “There are three periods at which the portions may have been intended to vest ; the period of the birth of the children, the period at which they would require their portions, which according to the ordinary habit in such cases, as evidenced by the usual course of settlement, would be at twenty-one, or as to daughters on marriage, and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I can see nothing which in any way imports that the portions were not intended to vest during the lives of the parents ; and to adopt the period of the death as the time of vesting, would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of

(a) See *Boycot v. Cotton*, 1 Atk. 556, where Lord *Hardwicke* approves of this decision.

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making any certain provisions for their families during the whole of their parents' lives. That is a result against which the Court has struggled, and successfully struggled, in many cases; and I think, therefore, that we should not be justified in adopting this period as the time of vesting, in the absence of anything on the face of the instrument indicating that it was so intended. Between the other two periods it is not, as I have said, necessary for us to decide; but I think it right to state that I lean to the opinion, that in this particular case the true period of vesting was at twenty-one, or as to daughters on marriage. The consequence of holding the portions to vest at the birth would be, that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement by giving to the father what was intended for the children; and the Court in these cases seems to have regarded rather the purpose than the words of the instrument."

In that case all the authorities had been cited; and coupling the observations of Lord Justice *Turner*, in which I entirely concur, with what has been done in the earlier cases, it seems to me impossible to hold, that a child who never attained twenty-one or married took an interest in this sum of £6000. It is true that in most of the cases the question arose with reference to the heir, but the decisions do not seem to have been rested exclusively on that ground. The purpose of the instrument is what the Court looks to; and here the purpose is not to give so much each to all the younger children, but to raise a gross sum of fixed amount to be divided among the class; and the question is, which of the children are comprised in the class intended to be benefited; and I am of opinion, upon the authorities, that I should not be justified in including the child who died in infancy.

The £6000 would, therefore, be divisible into four shares for the deceased son *William*, the deceased daughter

Lucy, and the Defendants *Mrs. Huguenin* and *Elizabeth Davies*; and *Mrs. Huguenin* is entitled under the covenant to have her share made up to £1500.

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Decree.

DECLARE, that the Defendant *Harriet Huguenin*, by virtue of the covenant by her father *John Davies* contained in her marriage settlement of the 12th September, 1829, is entitled to such a share in the sum of £6000 directed by the settlement of the 9th November, 1819, to be raised for the benefit of the children of *John Davies* and *Mary* his wife, other than their eldest son or only son, as she would have been entitled to if no appointment had been made by the said *John Davies* of the property comprised in the settlement of the 9th November, 1819.

DECLARE, that, in the events that have happened, the said sum of £6000 would, in the absence of any appointment, have been divisible into four equal parts between the personal representatives of *William Davies*, the personal representatives of *Lucy Davies*, the Defendant *Elizabeth Davies*, and the Defendant *Harriet Huguenin*.

DECLARE, that the difference between the share of *Mrs. Huguenin* and what she has received is to be raised out of the inheritance.

Costs of all parties out of the inheritance. Those of Plaintiff between solicitor and client.

TINSLEY v. LACY.

June 29th, 30th.

THIS Bill was filed by the publishers and owners of the copyright in two novels called "*Aurora Floyd*," and "*Lady Audley's Secret*," written by Miss *Braddon*. The novels had been dramatised by a Mr. *Suter*, and performed at the Queen's Theatre. The Defendant Mr. *Lacy* had published the two plays as they were performed.

Copyright—
Novel—Play—
Damage.

It is no infringement of copyright to represent a play dramatised from a novel written by another author; but it is an infringement to print and publish a play so constructed.

It was proved that a large portion of the dramas, including the most striking incidents, and much of the actual language of the novels, had been taken bodily from the novels. It was also in evidence that the profit on the publication of the plays had been almost inappreciable.

Perpetual injunction granted against the printing and publishing of

such a play without any preliminary inquiry as to damages.

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The Bill prayed a perpetual injunction against the publication of the plays, and an account.

Mr. *Rolt*, Q. C., and Mr. *Martindale* for the Plaintiff : —

The published drama is a mere compilation from the novel, with the same leading characters and same incidents, and in great part the same actual language. *

We also complain that certain ridiculous characters have been introduced, which have no connection with the plot or action of the piece, but which mar the effect of the work as a work of genius.

There can be no legitimate abridgment of a work of fiction, which in that respect differs from works of history or science. The only case which asserts the contrary is *Dodsley v. Kinnersley* (a), the reasoning of which would not now be followed.

The cases before the Dramatic Copyright Act have no application, nor have cases like *Reade v. Conquest* (b).

The VICE-CHANCELLOR referred to *Coleman v. Wathen* (c).

Mr. *Rolt*.—In that case it was held, that there had been no publication. But even if a legitimate abridgment of such a work be possible, this is not a fair abridgment. The *French* law gives excellent reasons why abridgments should not be encouraged : *Rout v. Arnould* (d).

The VICE-CHANCELLOR.—That is decided here the other way : *Bell v. Walker* (e).

(a) Amb. 403.

(b) 9 C. B., N. S., 755.

(c) 5 T. R. 245.

(d) *Le Blanc, De la Propriete
Literaire*, 118.

(e) 1 Bro. C. C. 451.

Mr. *Martindale*.—A fair abridgment required the book to be re-writ, to be, in the words of Lord *Eldon* (speaking of compilations), “a fair exercise of a mental operation, deserving the character of an original work:” *Wilkins v. Aikin* (a).

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[They referred also to *Reade v. Lacy* (b), *Lewis v. Fullarton* (c), *Bramwell v. Halcomb* (d), *Murray v. Bogue* (e).

They also compared the passages in the novels with those in the plays, to show the similarity.]

Mr. *Giffard*, Q. C., and Mr. *Kay*, for the Defendant:—

This case is merely intended as an advertisement. The profit on these two little books amounts to exactly 20s. each.

It is admitted, that anyone might have told the story or acted the drama.

The VICE-CHANCELLOR.—Or read the book aloud.

Mr. *Giffard*.—From the time of *Shakspeare* it has been the practice for dramatic authors to borrow their plots from published novels. Many of Sir *Walter Scott's* novels were dramatised, without any complaint on his part; and it is obvious that the original author is rather benefited than injured by such a course. These books are merely sold for the purposes of the theatre, and to enable the audience to follow the performance. Every critique necessarily states the scope of the story and would be equally liable to an injunction if the Plaintiff here is right.

At any rate, we must take the law as we find it, whether it be theoretically right or not; and by that law this is no in-

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|----------------------------------|----------------------|
| (a) 17 Ves. 422, 426. | (c) 2 Beav. 6. |
| (b) 1 J. & H. 524; s. c. at law, | (d) 3 My. & Cr. 737. |
| 759. | (e) 1 Drew. 353. |

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fringement of the Plaintiff's right: *Curtis* on *Copy-right* (a), *Gyles v. Wilcox* (b), *Dodsley v. Kinnersley* (c), *Dr. Hawkesworth's case* (d), *Butterworth v. Robinson* (e), *Grey v. Russell* (f), *Whittingham v. Wooler* (g).

The true test is, does the play interfere improperly with the sale of the novel? And it is obvious that it cannot do so.

The right of the public in any published work is absolute, except when restricted by the statute.

The VICE-CHANCELLOR.—The only point on which I wish to hear you, Mr. *Rolt*, is: whether there must not be some evidence that damage has been sustained: I am clear that there has been injuria, but I am not so sure that there has been damnum.

Mr. *Rolt*, in reply:—

The argument as to abridgments amounts to nothing. It is one thing to abridge a work, and quite another to appropriate every idea it contains as the material for a professedly independent work. If I show the injury as I have done, it is not necessary to prove the amount of damage. It is more a matter for opinion than for proof.

[He referred on the question of damage to *Carr v. Hood* (h).]

The account prayed for was waived.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case raises a question in some respects novel.

- (a) Pp. 265 et seq.
- (b) 2 Atk. 141.
- (c) *Ubi sup.*
- (d) *Lofft*, 775.

- (e) 5 Ves. 709.
- (f) 1 Story, 19.
- (g) 2 Swanst. 428.
- (h) 1 Camp. 355.

The intention of the Copyright Act was, no doubt, to secure to authors the full and complete benefit of their works ; but the Legislature did not think it right to provide that the works of an author should not be dramatised and used in another shape. It has been held, that to do this is not an invasion of the rights given by the statute ; and that anyone who pleases may dramatise the works of another person, without coming within the enactment which prohibits the multiplication of copies. The only way in which an author can prevent other persons from reciting or presenting as a dramatic performance the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, and bring himself within the scope of dramatic copyright.

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But although it is open to any actor or declaimer to recite a poem or other work written by another as publicly as he pleases, it could scarcely be said that he would be at liberty, on the occasion of his recitation or performance, to distribute copies of the work for sale among the audience ; nor could it be any excuse to say that the copies were intended merely to assist the audience, who desired, while listening to the recitation, to have a copy of the words in their hands. Now this is not very different from what has been done in this case.

Miss *Braddon* is the author of two works of fiction, which have proved very interesting from the incidents contained in them, and from the manner in which they are narrated, and of which a number of editions have been demanded by the public. The novels being thus popular, Mr. *Suter* took—not, indeed, the whole—but a very large portion of them, or at any rate constructed a very large portion of his own dramas out of passages taken word for word from the novels. He says, indeed, that half, or perhaps three-fourths, of his plays is original matter ; but it is admitted that the remainder has been taken bodily out of

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the Plaintiff's publications. That he was entitled to do this for the purpose of a mere acting drama is not disputed; but he is not so entitled for the purpose of printing or selling his compilation. He has taken, to use the language of Lord *Cottenham* in *Bramwell v. Halcomb*, the vital portion of the novels, the leading incidents of the plot, and in many instances the very language of the novel itself. He reprints in his books (and I confine myself to what appears in the books, and say nothing as to the represented drama) the very words of the most stirring passages of the novels. It is no answer to say that similar infringements have often been committed. Although Sir *Walter Scott* and other authors did not choose to assert any claim of this kind, this does not affect the rights of the Plaintiff; and it is to be observed, moreover, that there has been a considerable alteration of the law since the time referred to by the extension of copyright to dramatic performances. As was urged in *Campbell v. Scott*, acquiescence in the piracy of a portion of a work might embarrass proceedings to prevent a more extensive appropriation; and it is, therefore, of the utmost importance to authors to come at the earliest possible stage to obtain the protection of the Court against the violation of their rights of property.

It was argued, that what the Defendant has printed are plays and not novels, and that the case ought not to be dealt with as an ordinary case of infringement of copyright; but it is impossible to attach any weight to this distinction; and it is curious enough to observe, that the very stage directions in the plays are, in many instances, taken directly from the narrative portions of the novels, so that the supposed distinction between a play and a narrative almost disappears.

The question of the extent of appropriation, which is necessary to establish an infringement of copyright, is often

one of extreme difficulty; but, in cases of this description, the quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work. Here it is enough to say, that the Defendant admits that one-fourth of the dramas is composed of matter taken from the novels.

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In *Campbell v. Scott (a)*, which has a strong bearing on this point, the Defendants had published a work containing biographies and selections from the works of a large number of modern poets, and, among others, six short poems, and extracts from larger poems, written by the Plaintiff. The defence was, that the poems were bona fide selections, forming a very small proportion of the writings of the Plaintiff; that such compilations were cautiously made by the most respectable publishers; that the price of the compilation was £1. 1s., while the Plaintiff's entire works were published at 2s. 6d.; and that the Plaintiff would be rather benefited than injured by the Defendants' work, which contained 10,000 lines, of which only a few hundreds were taken from the Plaintiff's poems. The Vice-Chancellor, after observing that in the case of the *Encyclopædia Londinensis* the jury found for the Plaintiff, though the matter taken formed but a very small proportion of the work into which it was introduced, adds, that it is not necessary to consider whether the selections were the cream and essence of all that Mr. *Campbell* ever wrote. There is no doubt that in this case, as in that of *Campbell's Poems*, the passages taken were the striking passages, and these have been taken by the author of the Defendant's publications for the express purpose of using Miss *Braddon's* property for his own benefit. So long as he confined himself to dramatic representations he could not be interfered with; but when he printed his plays he brought himself within the letter of the law.

(a) 11 Sim. 31.

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The authorities by which fair abridgments have been sanctioned have no application. The Court has gone far enough in that direction ; and it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge. But these plays do not profess to be abridgments of the works of Miss *Braddon*, but are published as the original works of another author. Still less is there any analogy to the use which *Shakespeare* made of the writings of *Boccaccio* and others. Mr. *Suter* can scarcely maintain that he, like *Shakespeare*, has clothed the narratives of others in original language of his own, and given "to airy nothing a local habitation and a name." The only doubt which has occurred to me upon the whole case is that suggested by the singular case of *Whittingham v. Wooler*. It has, however, very much the appearance of a decision on the ground of the Plaintiff's perverseness in going on with litigation after he had obtained all that he required ; and the Court, not being very favorably impressed towards the Plaintiff, came to the conclusion that the Defendant's work was no more than a fair abridgment.

I do not think I should be justified in sending the case to a jury to determine whether any damages have been incurred ; and as to the law, I am bound to decide that myself. It would, in any case, be extremely difficult to measure the amount of injury done to an author by a publication of this kind. The account being waived, the decree will simply be for a perpetual injunction.

RE LIFE ASSURANCE TREASURY :

EX PARTE PEPPER.

THIS was an adjourned summons on behalf of *Tobiah Pepper*, a bankrupt, for his discharge from custody, under the following circumstances :—

The *Life Assurance Treasury* had been ordered to be wound up, and a call had been made against *Pepper* as the holder of 38,000 shares. He had not paid, and a balance order had been made, under which *Pepper* was committed to prison. *Pepper* was, shortly afterwards, adjudicated bankrupt; and the Official Manager, without having obtained any order for the purpose under the winding up, proved for the amount of the call. The bankrupt then applied to the Court of Bankruptcy for his discharge; which was refused, on the ground that he was imprisoned for contempt of the Court of Chancery. He then took out this summons in the winding up, for the purpose of obtaining his discharge. In the course of the proceedings, the bankrupt had been charged with various irregularities, and there were no assets.

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June 11th.

Winding-up Acts, (11 & 12 Vict. c. 41—12 & 13 Vict. c. 106)—*Bankruptcy Acts*, (12 & 13 Vict. c. 106—24 & 25 Vict. c. 134)—*Proof by Official Manager*—*Contempt*.—*Discharge*.

An order under the *Winding-up Acts* is necessary to justify the Official Manager in proving under a bankruptcy; but proof having been made without such order against a bankrupt who had been committed for non-payment of a call—*Held* that the bankrupt was entitled to his discharge.

Mr. *Sargood*, for *Pepper* :—

After the Official Manager had proved, the bankrupt was entitled, as of right, to his discharge, the proof being an election not to proceed against the bankrupt personally (12 & 13 Vict. c. 106, s. 182).

Mr. *Roxburgh*, for the Official Manager, submitted to act as the Court should direct.

Mr. *Swanston*, for the Creditors' Representative :—

The Bankruptcy Act of 1861 (24 & 25 Vict. c. 134), does not repeal the Act of 1849; but the 165th section

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introduces the provision that the order of discharge shall free the bankrupt from the effects of contempt. That order has not been obtained, and the mere proof by the Official Manager, without the concurrence of the Creditors' Representative, and without the order of the Court, cannot be treated as a binding compromise or arrangement so as to discharge the bankrupt.

The VICE-CHANCELLOR asked if there were no order authorizing the proof.

Mr. *Roxburgh*.—An order has not been considered necessary under the Winding-up Acts.

The VICE-CHANCELLOR referred to the Winding-up Act, 1849 (12 & 13 Vict. c. 108), s. 30.

Mr. *Sargood*, in reply.—The grounds on which an order for discharge may be refused by the Court of Bankruptcy are those only which are stated in sect. 159 of the Act of 1861. The 165th section merely substitutes the order of discharge for the certificate. By the Winding-up Act, 1848 (11 & 12 Vict. c. 45), s. 29, all the Company's assets are vested in the Official Manager, and the Court of Bankruptcy was bound to regard him as the only person to determine whether to prove or not, and when he has proved, the legal consequences follow as in any other case. The Creditors' Representative has no *locus standi* in the Court of Bankruptcy.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

The Official Manager has been guilty of great carelessness in making this proof without the direction of the

Judge in Chambers. There was an important question to be considered, whether a prosecution of the bankrupt ought not to have been directed; for there was, at any rate, ex parte evidence of an apparently gross fraud in contracting this enormous liability, without any means of payment. The Winding-up Act, 1849, sect. 30, directs that the Official Manager may prove for any balance ordered by the master to be proved; which implies a prohibition to prove without an order authorizing the proof. There was, therefore, great neglect of duty on the part of the Official Manager; but, on the other hand, as regards the bankrupt, the 25th section of the Winding-up Act, of 1848, vests the whole control in the Official Manager, and the bankrupt could not object that the proper sanction had not been obtained in the winding-up proceedings. The position of the Official Manager is analogous to that of an assignee in bankruptcy under the old law, by which the assent of creditors was necessary to enable him to sue; but any neglect of duty by the assignee in complying with the required forms, would be no answer to his suit. So here the Official Manager should have complied with the regulation which requires an authority to prove; but his having acted without this preliminary sanction, was a matter with which the bankrupt had nothing to do, and could not have been set up by him in opposition to the proof. There has, therefore, been no acquiescence by the bankrupt; the application, therefore, must be granted.

There will be no costs to the bankrupt; and the costs of the Official Manager will be suspended. The Creditors' Representative will have his costs.

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The Lunacy Act gives no jurisdiction to alter a lunatic's will; and if the proviso has this effect, it is *ultra vires*. But this is not the meaning of the proviso. If the *Hopton* estate had been mortgaged alone, there could be no doubt that the estates devised for payment of debts must be first applied in satisfying the mortgage debt. It can make no difference that a second collateral security was included in the mortgage.

Mr. *Rogers* replied.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question for my decision is, whether a certain estate, called the *Hopton* estate, belonging to a testator, *John Freeman* (who was found lunatic subsequently to the date of his will), is or is not exonerated from a mortgage made under the 116th section of the Lunacy Regulation Act, 1853, by the directions contained in the will.

The will contains devises of different estates, some to be sold immediately, and others in certain future events, and the proceeds of the sales are directed to go upon the trusts of the personal estate. The first of these trusts is a trust for the payment of all testator's just debts, and, subject thereto, the fund is given upon trusts for the benefit of the Plaintiff and several of the Defendants. After the date of his will, the testator purchased the *Hopton* estate. He appears, by his will, to have disposed of all the real estate which he then possessed, but there was no clause sufficient to pass future estate, and the *Hopton* estate has, accordingly, descended to the heir. After the purchase of the *Hopton* estate, the testator deposited the title deeds with his bankers, to

secure his banking account. This was in 1858; and in December, 1859, he was found lunatic, not having altered his will in the meantime; and it appeared that there were debts amounting to £1,522, for payment of which it was thought desirable to raise, by mortgage, a sum of £1,600. A mortgage was accordingly directed by the Court, and executed, whereby the *Hopton* estate was declared to be primarily liable, as between the lunatic his heirs and devisees, to the £1,600; another estate, called the *Kenton* estate (one of those devised by the will) being also included in the security. The question upon these facts is, whether this proviso in the mortgage deed controls the directions in the will, by which the proceeds of the sale of certain estates other than *Hopton*, are to be applied in payment of the testator's debts; whether, in fact, the proviso in the deed abrogates the ordinary rule, that where an estate is devised for the express purpose of paying debts (as distinguished from a mere charge of debts), it must first be exhausted before any other property can be touched.

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The case was extremely well argued on both sides, but the contest really reduces itself to this:—It is admitted (as it must be,) that, under the will, the estates devised for payment of debts would be primarily applicable for that purpose in exoneration of the descended estate. But it is said that the terms of the mortgage deed make the *Hopton* estate liable to the mortgage debt, in exoneration of the estates devised by the will. The contention, on the other side, is, first, that the Lords Justices had no jurisdiction to make an order having any such effect; and secondly, that, on the true construction of the order and the deed, no such effect is produced or intended.

The first branch of the argument is founded on the 116th section of the Lunacy Act, 16 & 17 Vict. c. 70,

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which, it is said, does not give an authority to the Lords Justices to introduce into the mortgage deed a proviso having the effect attributed to the proviso in this deed. That section empowers the Lord Justices to charge, by way of mortgage or otherwise, and dispose of the property of a lunatic in order to raise money for payment of his debts; and I am not prepared to say that this authority has been at all exceeded. I apprehend that the practice in lunacy under this section, is to regard the benefit of the lunatic only in determining the mode in which the money shall be raised; and for this purpose it would have been quite competent for the Court to have selected the *Hopton* Estate only, as the subject of the mortgage, if that had been considered the most advantageous course. The Court, having this larger power, must also have had the smaller power of saying, that, though other estates are included in the security, the *Hopton* Estate shall be first liable. The enactment of the 139th section of the Act, that every deed executed in the manner prescribed under the order of the Lord Chancellor or the Lords Justices in Lunacy shall be valid, cannot be construed as having any further operation than this, that the proviso must have its full effect, whatever that may be. The question of exoneration always depends on the intent of the testator whose estate you have to deal with. The authorities cited on this subject have no bearing on the present question. In *Graves v. Hickes*, the question was simply, whether the testator was subject to a personal debt in the proper sense, or whether the covenant which he had entered into was not merely subsidiary to the primary purpose of creating a charge on certain real estate; and the Court held, that the purpose was to give a security on the estate, and that the case must be dealt with in the same way as that where a new covenant is entered into on a transfer of a mortgage. Now, in this case, there is no dispute that the debt is a debt of the testator's estate.

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The only question, therefore, is as to the operation of the proviso in the mortgage deed, and that does not purport to say, that, as between the claimants of the personal estate and the persons who might become entitled to the *Hopton* estate, the latter should be primarily liable. If the mortgage had been, in fact, the act of the testator himself, an argument might be founded on the proviso, to the effect that it manifested an intention to make the *Hopton* estate primarily liable in exoneration of his other property ; but it is impossible to reason in this way with reference to a lunatic incapable of any intention at all. I agree that the proviso must have its effect. Suppose that a sane person, after executing a deed with a proviso of this description, were to say that his debts were all to be paid out of other property notwithstanding the proviso, that would clearly overrule it. It does not follow, therefore, that to give effect to the proviso it is necessary to hold the other estates exonerated. The question really is, what is the true construction of this proviso. I take the intent of it to have been this : In administering the lunatic's estate the Lords Justices considered that the *Hopton* estate was that which could be most beneficially applied in the first instance in payment of the debts. If this estate had been ample, the mortgage would have included no other, and the proviso would not have been inserted. It was required only because the mortgagee insisted on further security, and was inserted in order to point out, that, in case of the mortgagee enforcing his security, the *Hopton* estate was to be exhausted before the other property was to be touched by virtue of the mortgage. I must assume that the terms of the will were unknown at this time, though no doubt a will was known to exist. Now that the will has to be administered, it is found that certain estates are devised expressly for payment of debts ; and if they are applied for that purpose it is not by force of anything in the mortgage deed, but by force of the will with which

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the mortgage deed did not purport to interfere. If estate X had been put into the mortgage deed alone, and estate Y left out altogether, that would not prevent Y being applied first in payment of the mortgage debt if the testator so directed by his will. Neither will it do so where both estates are comprised in the mortgage, with a declaration that X is to be primarily liable. The devisee of the estates other than *Hopton* is only devisee of what shall remain after payment of testator's debts; and that being so, why is not this mortgage debt to be taken out of them as well as all the other debts? The accident of one of the devised estates being included in the mortgage cannot affect the question in any way. I am of opinion, therefore, that the proviso does not operate, and was not intended to operate, so as to alter the effect of the will; and it becomes, therefore, unnecessary to consider the first point, whether it would have been within the province of the Lords Justices to do anything which would have the effect of restricting the operation of a will already made.

There will be a declaration, that, as between the heir-at-law and the devisee of the estates directed to be sold and applied together with the personal estate in payment of debts, the proceeds of such sales are applicable in the first place to the payment of the mortgage debt.

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June 30th.

HUGHES v. JONES.

THIS cause came on upon further consideration, the only question being as to the extent of an exception contained in the residuary devise of the will of *Margaretta Bowen Nicholl*.

By the settlement on Mrs. *Nicholl's* marriage with *David Fryer Nicholl*, dated the 17th of April, 1838, freehold and leasehold property belonging to her absolutely was settled as follows:—As to part for a term to secure an annuity to the husband, and subject thereto the whole to such uses as Mrs. *Nicholl* should appoint by deed or will; remainder as to part for a term to secure portions for younger children of the marriage; and subject thereto to the children in strict settlement; and subject thereto as to the whole to Mrs. *Nicholl* in fee; and the settlement contained a covenant in the following form: It is hereby provided, and the said *David Fryer Nicholl* covenants with the trustees that if any real estate or other property shall vest in the said *D. F. Nicholl* in right of his wife or in the wife “by descent, limitation, gift, or otherwise,” the same shall be conveyed by the husband and wife upon the trusts of the settlement. Mrs. *Nicholl* was also entitled to a life interest in other property.

Will—Wills Act (1 Viet. c. 26)—After-acquired Property—Excepting Clause.

Testatrix devised all property, except that subject to the trusts of a specified settlement and not disposed of under the power therein contained. Subsequently she purchased other property, and settled it in substance on the same trusts:—Held that the after-purchased property was not within the exception, but passed by the will.

Whether the 26th section of the Wills Act applies to excepting clauses—*Quære.*

By her will, dated the 18th of August, 1838, Mrs. *Nicholl* made the following residuary devise and bequest, “As to all the residue and remainder of my real and personal estate whatsoever and wheresoever, and of what nature and kind soever, that I may die possessed of, and not given and devised by this my will, (except such real and personal estate as may remain subject to the trusts of my said marriage settlement by reason of no specific disposition of any part thereof having been made by me under the power

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for that purpose therein contained, and of which this general devise and bequest is not to be taken as in execution), I give, devise, and bequeath"—then followed limitations under which the Defendants were entitled.

By an indenture, dated the 29th of December, 1854, certain real estate, which had been purchased with money derived from the savings of the separate estate of Mrs. *Nicholl*, was conveyed to the use of such persons as Mrs. *Nicholl* should appoint by deed or will, and, subject thereto, for the separate use of Mrs. *Nicholl* during the coverture, remainder to Mrs. *Nicholl* in fee. At this time Mrs. *Nicholl* was about 60 years of age, and in 1858, she died, never having had any issue.

The Plaintiff, the heir-at-law of Mrs. *Nicholl*, claimed the lands conveyed by the deed of 1854, as being within the exception contained in the residuary devise.

Argument.

Sir H. Cairns, Q.C., Mr. *Hobhouse*, Q.C., and Mr. *Swanston*, for the Plaintiff:—

There is no devise of this property, unless it is to be found in the residuary devise. In that clause the testatrix has expressly excepted from the operation of the devise all such property as might remain subject to the trusts of the settlement. The settlement, it is to be observed, contained a covenant to settle future property; and whether this did or did not compel Mrs. *Nicholl* to bring her separate savings into settlement it was evidently so considered; and, in fact, these savings were invested in the purchase of the land now in question, and the land was conveyed to uses identical with those of the settlement, except that a provision for future children, which, by reason of the lady's age, would have been absurd, was

omitted. It will be said that the land is not subjected to the trusts of the settlement, by way of reference ; but the trusts are repeated substantially and intentionally in the same form in a new deed. If, therefore, the will had been made subsequent to this conveyance of the land, there could have been no doubt that the testatrix, in excepting all the land subject to the trusts of the settlement, and allowing them to descend, must have meant the exception to operate on these after-purchased lands. Then, does it make any difference that the will was made before the land was brought into settlement ? Clearly not, because the will must speak from the death, by force of the 24th section of the Wills Act, unless a contrary intention shall appear ; and there is nothing here to show a contrary intention. The utmost that can be said is, that the testatrix does not specify whether she intends the exception to include property brought into settlement after the date of the will ; but it is precisely when the testatrix is silent that the Act is intended to apply. In *Thomas v. Jones* (a), this same will was held to speak from the death, so as to execute an after-acquired power ; and the contrary intention in that respect was certainly more apparent than it is here.

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The *Solicitor-General* (Sir *Roundell Palmer*), Mr. *Giffard*, Q.C., and Mr. *W. Pearson*, for the Defendants *Jones* and wife, who claimed under the devise :—

The only real question is already determined by *Thomas v. Jones*, viz. that everything not specially excepted passes by this residuary devise. Now, what is the exception ? Why an exception of the property which might remain subject to the trusts of the settlement of the 17th of April, 1838. How can that include property subject to the trusts of the settlement of 1854 ? It is said the trusts

(a) 2 J. & H. 476.

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are identical ; but that is not so, although they are similar ; and if they were absolutely identical, property described as comprised in one deed cannot include property comprised in another deed, even though the limitations may be the same. Therefore, even if the will had been subsequent to 1854, the exception would not have been sufficient to exclude the property now in dispute. But the contention becomes absurd when it is sought to narrow the operations of a devise by the statutory rule, which was meant merely to sweep into a general devise all that the testator might be possessed of at his death. The statute does not say that the exclusion of property from the operation of a will shall be read as on the day of the death, but only that the will shall be construed "with reference to the real estate and personal estate comprised in it" to speak from the death. To apply this to an excepting clause would be to make the will speak from the death with reference to property excluded from the will, and would do violence both to the words and the spirit of the statute.

It is not necessary to dwell on the covenant to settle future property, which it has been suggested makes the deed of 1854 a sort of offshoot of the settlement of 1838. If it did, it would not make it the same deed, and therefore not the deed referred to in the exception. But, in fact, the deed of 1854 was not in accordance with this covenant, because the children are not provided for. It does not purport to be executed in performance of the covenant ; and, indeed, the savings of Mrs. *Nicholl's* separate estate were clearly not included in the terms of this covenant. Moreover, independently of the omission of the clause in favor of children, the two properties are held by distinct estates, and the materiality of such a distinction is illustrated by *Walker v. Armstrong* (a). Beyond all this, the whole devise shows an intention to

(a) 21 Beav. 284.

pass every thing except certain specified lands, and that is, surely, the plainest contrary intention to the exception of any other lands whatever. In fact, the argument on the other side takes a section of the statute which is to apply only in the absence of a contrary intention, reads the will by the light of that section, for the purpose of excluding an otherwise palpable contrary intention, and then concludes that there is no contrary intention at all. They are obliged to import the section first to get rid of the contrary intention, the existence of which forbids them to import the section at all.

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[They also cited *Cole v. Scott (a)*.]

Mr. *Hobhouse* in reply :—

The statute clearly directs, that, for all purposes of ascertaining what is and what is not comprised in a will, it is to be read as speaking from the death; and this must apply equally to land which the testatrix says she will not include, as to land which she says she means to pass.

Then where is the contrary intention? In *Cole v. Scott* it was plain, in the use of the word “now”; but here the testatrix speaks of the property which may be subject to the trusts at her death.

Then, as to the nice distinction, that the trusts are declared by a different deed: If there were anything in it, it is disposed of by the covenant to settle. By force of that, this land was settled in equity by the deed of 1838, before it was settled legally by the deed of 1854. And this property was bound by the covenant, as is tolerably clear from the authorities, all of which are cited in 9 *Jarm. Conv. (b)*. However, this is not material, because, whether strictly bound or not, Mrs. *Nicholl* accepted the obligation.

(a) 1 M. & G. 518.

(b) Page 111.

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v.

JONES.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Although there is no doubt room for much plausible argument in favor of the opposite view, I am clearly of opinion that the property in dispute passed by the residuary devise. The Wills Act provides, by the 24th section, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear; and, by other sections, that a general devise shall (in the absence of the like contrary intention,) pass all real property which the testator could dispose of or appoint. In this case the testatrix did express a contrary intention as to certain property which she described and excepted out of the residuary gift; and the only contest is, what this property is. The language of the exception is:—“Except such real and personal estate as may remain subject to the trusts of my said marriage settlement (that was the settlement of the 17th of April, 1838, which she had recited), by reason of no specific disposition of any part thereof having been made by me under the power for that purpose therein contained, and of which this general devise and bequest is not to be taken as an execution.” This seems, at first sight, the plainest possible statement of what the testatrix means to except; and it imports, in the strongest possible way, an intention to dispose of everything else.

I shall pronounce no opinion at present on the very nice question—how far the 24th clause of the Wills Act applies, so as to require me to construe the exception in the same way as if the whole will had been written the day before the death of the testatrix. It may be, that you cannot arrive at the property comprised in the devise without construing the exception; but it is not necessary, in the view I take of the will, to decide whether the 24th

section is to be applied to the construction of the excepting clause. The testatrix speaks of excepting property subject to the settlement, by reason of no disposition having been made under the power therein contained. She refers to a specific instrument, and a power therein contained, and can only be speaking of property comprised in that deed. The property in dispute was purchased by the testatrix, and settled, in 1854, upon trusts similar to those in the original settlement. Suppose *Blackacre* to be conveyed to uses to bar dower, and then a devise, with an exception of all property subject to the trusts of this indenture, and not disposed of under the power therein contained. After that, suppose a purchase of *Whiteacre*, and a conveyance of that to the same uses as *Blackacre*. That would be identical with the case now before me; but no one could say that the exception in the will extended to *Whiteacre* because the dower uses were the same as those in the case of *Blackacre*. The only ground for treating the two cases differently would be a lurking suspicion that in this case there may have been some reason connected with the nature or circumstances of the property for conveying the purchased land upon trusts similar to those of the first settlement. But I must construe the will by what I find in it, and when I see an exception of specific property subject to the trusts of one deed, I cannot extend this to property which is subject to these trusts in no other sense than this, that it was long after conveyed upon trusts of a similar kind. Moreover, when I find the testatrix speaking in the same clause of the property as being subject to the power therein (that is, in the settlement of 1838,) contained, it would not be correct reasoning to say, that by reading the will as speaking from the death other property subject to another though co-extensive power in a subsequent instrument could be comprised within the description. It would be going much too far to say that this language, if used immediately before the

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 —
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death of the testatrix, would comprise all property subjected to similar powers long after the date of the original settlement, and contained, not in the deed referred to, but in an entirely different instrument. I could not so read the will, merely because the second deed was one which the testatrix was bound to execute by force of a covenant contained in the first; and it is therefore unnecessary to say whether the covenant to settle applied to the property with which the subsequent purchase was effected, though, if necessary, I should not have much hesitation in holding that it did not so apply. There will therefore be a declaration that all the property comprised in the settlement of 1838 passed to the Plaintiff as heir, and the rest to the Defendant.

Dec. 10th.

*Lands Clauses
 Act—Aban-
 donment of
 Purchase—
 Costs.*

EX PARTE BIRMINGHAM, WOLVERHAMPTON,
 AND DUDLEY RAILWAY COMPANY.

A Railway Company served a notice to treat, and gave the usual bond, and made the deposit required by the 85th section. The landowner filed a Bill to restrain the Company from entering, but a motion for injunction stood over by arrangement, and no further steps were

THIS was a petition of the *Birmingham, Wolverhampton, and Dudley Railway Company*, for the retransfer of a deposit paid in to the account of the *South Staffordshire Railway Company* (as landowners), and for the cancelling of the bond given under the 85th section of the *Lands Clauses Consolidation Act*.

On the 1st of August, 1851, the *Birmingham Company* paid in a deposit of £2,860, and gave the usual bond to the *South Staffordshire Railway Company* in respect of land belonging to the latter Company and required by the Petitioners.

Ultimately, the Company abandoned the purchase with the concurrence of the owner:—*Held*, on a petition for a re-transfer of the deposit to the Company, and for the cancelling of the bond, that the owner was not entitled to have the costs of the suit out of the deposit. But, *semble*, he would have been so entitled if the purchase had been abandoned by reason of the inability of the Company to complete.

The land never was taken, and the Petitioners, with the concurrence of the *South Staffordshire Railway Company*, abandoned the intention to take the land, and had obtained power to make a substituted line.

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EX PARTE
BIRMINGHAM,
WOLVER-
HAMPTON, AND
DUDLEY
RAILWAY
COMPANY.
Statement.

In 1861 a Bill had been filed by the *South Staffordshire Railway Company* to restrain the Petitioners from taking possession of the land, and a motion for injunction had been ordered to stand over. No further proceedings had been taken in the cause.

The Petition prayed a retransfer of the deposit, and that the bond might be cancelled.

Mr. *Saunders*, for the Petition :—

Argument.

The proposed purchase is abandoned, and our line altered with the concurrence of the Respondents. The bond and deposit, therefore, have become unnecessary, and we ask to have the money paid out.

Mr. *Speed*, for the *South Staffordshire Railway Company* (the landowners) :—

We filed an injunction bill against the Petitioners to restrain this purchase; and the deposit ought not to be paid out till any costs which may be payable to us in that suit have been provided for.

The 87th section of the Lands Clauses Consolidation Act enables the Court, when the bond is not satisfied, to apply the money for the benefit of the landowner; and under that power it may well be retained against our costs.

Mr. *Saunders*, in reply :—

In two cases Lord *Cottenham* refused to apply a deposit in payment of costs of a litigation between the Company

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 {
 EX PARTE
 BIRMINGHAM,
 WOLVER-
 HAMPTON, AND
 DUDLEY
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 COMPANY.

and the landowners :—*Ex parte Great Northern Railway Company (a)* ; *Ex parte Stevens,—Re London and South Western Railway Company (b)*.

Mr. *Speed*, in reply on the cases cited :—In these cases the condition of the bond was performed, and the Court had no option but to pay out the deposit.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I do not think there is any lien on the deposit for the costs of the injunction suit. The only real point for consideration arises from the fact that the condition of the bond is not fulfilled, and that the Court is therefore empowered to apply the money for the benefit of the true owner. The case would be very different if the condition of the bond had been broken by reason of pecuniary inability on the part of the petitioning Company. In such a case the Court would take care that the fund should not be parted with until all costs occasioned by the notice were provided for ; otherwise a company would always be at liberty to seize land against the will of the owner, and then say we cannot purchase the land ; we are unable to fulfil the condition of our bond ; and we will apply to the Court and obtain the return of our deposit. But it is very different where the intended purchase is abandoned, and the condition of the bond left unperformed (as it is here) with the full concurrence of the landowner. I am of opinion, therefore, that the only remedy of the Respondents for the costs of their suit is to proceed in the usual way in that cause. The order will, therefore, be to re-transfer the deposit, and to cancel the bond. The costs of this application according to the Act.

(a) 5 Railw. Cas. 269.

(b) 5 Railw. Cas. 437.

DAVENPORT *v.* DAVENPORT.

JOHN DAVENPORT, the testator in this cause, by his will dated 18th April, 1862, devised all his residuary real and personal estate to the Defendant (who was his eldest son), subject to a direction, that he should, within twelve months after the testator's death, "make and execute good and valid assurances in the law for settling all my estate of *Foxley* to the use of the said *George H. Davenport* (the Defendant) for life, with remainder to his first and other sons successively in tail male or in tail general, or in tail male, with remainder in tail general, or otherwise in tail as the said *George H. Davenport* shall think proper, with remainder to my son *Henry T. Davenport* (the Plaintiff) for life, with the like remainder to his first and other sons in tail; with remainder to the first and every other daughter of the said *George H. Davenport* successively in tail general, with remainder to the first and every other daughter of the said *Henry T. Davenport* successively in tail general, with remainder to the survivor of my said sons, his heirs and assigns, for ever." And the testator directed that such settlement should contain "such powers of jointuring, of charging with portions for younger children, of sale and exchange, for appointment of new trustees, and other powers of the like nature, and for giving effect to such former powers" as the Defendant should direct; and that the same should also contain "all other usual and proper provisions for giving effect to my intention, as herein expressed, and all such other powers and provisions as counsel shall advise."

The present question in the cause was, whether the life estates should or should not be made without impeachment of waste.

It appeared that a large portion of the estate consisted of timber.

1863.

Nov. 3rd, 4th.

*Will—Executory Devise—
"Usual and proper Provisions"—
Waste.*

Where a testator has devised his estate to *A.* in fee, with a direction that it should be settled to the use of *A.* for life, remainder to his sons successively in tail general, or otherwise in tail as *A.* should direct, remainder to the daughters successively in tail general, remainders over; and that the settlement should contain "all usual and proper provisions" for giving effect to this intention, and all such other powers and provisions as counsel should advise—a limitation of the life estate "without impeachment of waste" is not authorised by the will.

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 v.
 DAVENPORT.
 Argument.

Mr. *Rolt*, Q.C., and Mr. *Charles Hall*, for the Plaintiff:—

The intention is to give life estates with the usual incidents. Impeachability for waste is one of those incidents; and the usual direction to the contrary is not a power or provision of the nature authorised. The discretion given to counsel goes to questions of management merely. It cannot be supposed that they were to have power to alter the estates directed by the testator.

Mr. *Amphlett*, Q.C., and Mr. *Martindale*, for the Defendant:—

The testator has not here been his own conveyancer. These are mere heads or instructions; and any conveyancer on those instructions would insert the words “without impeachment of waste” after the limitation of the life estate. [They referred to *Leonard v. Lord Sussex* (a), *Bankes v. Le Despencer* (b), *White v. Briggs* (c)].

It is admitted that some timber must be cut for the benefit of the estate.

Mr. *Rolt*, in reply:—

In *Leonard v. Lord Sussex* there was a distinct intention that the first takers should have as large an estate as was compatible with a prohibition on alienation: that is not so here. In the other cases cited, the testator had not attempted to point out the particular estates to be taken, but only the general intention to keep the estate in particular lines of descent: that is not so here.

No discretion is given to counsel which could affect this question.

If counsel should introduce any provision for cutting timber for the benefit of the estate, the price must be treated as capital, and brought into Court.

(a) 2 Vern. 526. (b) 10 Sim. 576; 11 Id. 508. (c) 15 Sim. 17.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

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—
Judgment.

The only question in this case is, whether or not, in a settlement to carry out the directions contained in the will of the testator, a clause ought to be inserted exempting the tenant for life from liability to be impeached for waste. The devise in question is clearly executory in the sense in which that term is understood by the Court, that is to say, it is a devise which requires a deed to be executed in order to carry into effect the intentions of the will. Where a testator attempts to operate upon an estate himself, makes himself his own conveyancer, as the phrase is, and does so imperfectly, without directing the execution of any future instrument, the Court has no power of controlling the effect of the will; but where a future deed is directed, the Court assumes that the testator may not have stated fully all the details of his scheme, and endeavours to give the fullest possible effect to his directions by the mode in which it carries them into execution. The reason of this rule is very clearly put in *Papillon v. Voice* (a), in the argument of counsel, which was adopted by the Court, where it is said—"As to the notion that the conveyance directed by a will should be in the words made use of in the will, it was impossible this rule could universally hold. It is the office of a court of equity to explain the words, and put such a construction upon them as that a proper legal conveyance may be made of the premises." To follow the exact words would often defeat the purpose of the will. The principle has been most frequently applied to limitations falling within the rule in *Shelley's case*; and in the great majority of cases the principle has been applied to limit and not to extend the estates which the strict words of the will would give. Thus, where a testator uses words which per se would create an estate tail, and at the same time an intention

(a) 2 P. Wms. 475.

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 —
Judgment.

can be implied from the language of the will (or in cases of settlements either from the language or from the nature of the instrument,) to keep the estate in the family, there the Court leaves in the first taker the largest possible measure of ownership which is consistent with depriving him of the power of defeating this general intention. Alienation is restrained by cutting down the estate tail to an estate for life, but subject to this the largest possible interest is allowed to remain.

That is the character of all the authorities that were cited. In *Leonard v. Earl of Sussex* (a), the words of the will gave clear estates tail; but it was added, that the sons were never to have the power of docking the entail. Thus there were two inconsistent intentions expressed: one to keep the estate in the family; the other to give the sons estates which conferred upon them the absolute dominion. The limitations were executory, and the Court gave the sons all that could be given to them consistently with the preservation of the estate in the family. The life estates introduced into the settlement were therefore without impeachment of waste, the object being to confer the largest possible interest which could be given without carrying with it the power of alienation.

Woolmore v. Burrows (b) was a case of a slightly different kind. There the direction was, that the property should be closely entailed; and in such cases the Court, attaching a distinct meaning to a strict settlement, so frames it as to give to the first taker the largest possible enjoyment (including, therefore, the power of cutting timber, and the like,) which can be given without the power of alienation.

The strongest case is *Banks v. Le Despencer* (c). There the limitations of a settlement were to two persons successively for life, punishable for voluntary waste, and

(a) 2 Vern. 526. (b) 1 Sim. 512. (c) 10 Sim. 576; 11 Id. 568.

then to trustees, upon trust, to convey the land in strict settlement, as counsel should advise or the Court of Chancery should direct; and the Court directed a settlement in which the first estate for life was without impeachment of waste. This was, so far, a strong decision, because in the previous life estates voluntary waste had been left punishable; but the decision may be sustained on the ground that the term "strict settlement," without more, is understood, in accordance with the common form of such instruments, to imply estates for life without impeachment of waste; in fact, the largest possible estate consistent with the preservation of the property in the family, comprising, as such settlements do in their ordinary form, the largest powers for jointures, portions, and the like, so as to make the tenant for life, as nearly as may be, owner, so far as that character can be separated from the power of alienation.

White v. Briggs (a) was a very clear case, because there the testator had said: I give to my wife the entire use of all my property, and after her death my nephew to be considered heir; but I direct the property to be secured for the benefit of his family. These two directions of course were not entirely consistent; and the Court directed a conveyance, in which the widow's life interest (which was an immediate devise, and not within the power of the Court to affect, except by way of construction) was made dispunishable for waste, and a life estate was given to the nephew also without impeachment of waste, on the same principle which prevailed in the other cases. All these authorities have this common quality, viz. that words importing a larger estate are cut down to an estate for life without impeachment of waste; but no case has been cited where an estate for life has had any addition made to it by the manner in which the Court has executed an executory trust.

(a) 15 Sim. 17; 2 Ph. 583.

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—
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In this case there is, it is true, a devise in fee to the trustee; but that does not affect the question, because it is upon trust to settle. The circumstance that the trustee is entrusted with a large discretion as to the extent of jointuring powers and other matters, does not indicate that he is (as against his own children) to have power to deprive them of a large amount of property. Then there is a direction that the settlement shall contain all usual and proper provisions for giving effect to testator's intention as therein expressed; but that is an intention to give a life estate, and nothing more. The settlement is also to embrace all such other powers and provisions as counsel shall advise; and we must consider the will in the light of instructions to counsel; and upon such instructions counsel must advise for the benefit of all persons interested, and would not be justified in inserting words making the tenant for life punishable for waste, except by way of suggestion, for the consideration of the settlor, with a query appended whether this was what was meant. In construing the testator's intention, the Court cannot put this query, and cannot, therefore, introduce the words without first discovering a clear intention to give all that could be given without the power of alienation. This intention is what you find in all the authorities relied on; but here there is nothing of the sort, but only an intention to give an estate for life, with certain large powers annexed to it.

Some argument was founded on the nature of the property, which seems to consist in great part of timber; and under these circumstances, one would have expected to find an express direction as to the powers of cutting timber to be given to the tenant for life; and certainly not that such a power should be given merely by the general words "such powers as counsel shall advise," and this where a power of sale and exchange is in terms directed to be given.

On these grounds it appears to me impossible to add to the life estate given by the will. At the same time, I can give the trustees such powers as will be necessary for the proper management of the estate, for the benefit of all persons interested therein.

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Judgment.

ESTABLISH the will and carry the trusts into execution. Refer it to Chambers to effect a proper settlement.

Minute.

DECLARE that such settlement ought not to make the tenant for life punishable for waste, but that proper powers should be inserted enabling the trustees to cut timber in due course of management, for the benefit of all persons interested in the estate.

Costs of all parties to be charged on the estate.

EDYE v. ADDISON.

Nov. 17th.

IN the settlement, dated the 22nd of July, 1845, on the marriage of the Plaintiff (then *Jane Bell*) and the Defendant *John E dye*, was contained a recital of an intention to settle any future property that the wife might acquire; and the following covenant:—

*Settlement—
Covenant to
settle future
Property—
Joint Tenancy.*
Covenant in
marriage set-
tlement by
husband and
wife to settle
all property of
the value of
£200 which
the husband
and wife, or
either of them
in her right,
should during
the coverture

“ And the said *John E dye* and *Jane Bell* the younger do hereby jointly for themselves, their heirs, executors, and administrators, and each of them doth hereby separately for himself and herself, his and her heirs, executors, and administrators, covenant with the said *John Bell* and *George Addison*, their executors and administrators, that

become entitled to other than separate property or life interests of the wife:—*Held*, that property devised and bequeathed to the husband and wife as joint-tenants was not within the covenant.

Seemle, that property which does not vest in possession during the coverture is not within a covenant so framed.

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—
Statement.

if at any time or times during the said coverture they the said *John Edye* and *Jane Bell* the younger, or either of them in her right, shall, by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects of the value or to the amount of £200 or upwards at any one time (other than except interests which shall be restricted to the life of the said *Jane Bell* the younger, or which, whether so restricted or not, shall be settled and limited to her separate use and disposal,) then and in every such case the same shall be forthwith, at the cost of the said trust estate, conveyed, transferred, assured, and paid to the trustees or trustee for the time being of these presents, upon the trusts herein declared concerning the trust moneys and premises hereinbefore assigned or assured by the said *Jane Bell* the younger, or intended so to be, or such of them as shall be then subsisting or capable of taking effect, or as near thereto as the nature and qualities of the said properties respectively will admit.

Joseph Bell, a brother of the Plaintiff, by his will, dated the 23rd of August, 1861, gave, devised, and bequeathed all his real and personal estate unto and to the use of the Plaintiff and her husband, the Defendant *John Edye*, their heirs, executors, administrators, and assigns, as joint tenants, subject, nevertheless, to the payment thereof of all his (the testator's) just debts, and funeral and testamentary expenses, and to a legacy of £100, and an annuity of £50 by the said will bequeathed. And the testator appointed the Plaintiff, and Defendant *John Edye*, executors of the said will.

The testator died on the 3rd of October, 1862.

There had been no issue of the marriage, and this Bill was filed by the wife against her husband and the trustee,

for the purpose of obtaining a declaration whether the property taken under the will of *Joseph Bell* was subject to the covenant.

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Mr. *Giffard*, Q.C., and Mr. *Hemming*, for the Plaintiff:—

Argument.

It is doubtful whether it is for the Plaintiff's interest to have the property settled or not, though she would rather prefer to keep it out of settlement, there being no probability of children to be provided for. The real contest, however, is between the Defendants. The principle seems to be, that husband and wife taking by entireties cannot under this gift be said to be possessed in right of the wife, and if not, the property is not subject to the covenant. Both in estate and devolution the interest taken under the will of *Joseph Bell* is distinct from an interest taken in right of the wife, neither husband nor wife having the power alone to alienate or sever: *Prest. Est. (a)*, 2 *Jarm. on Wills (b)*, *Atcheson v. Atcheson (c)*.

Mr. *Rolt*, Q.C., and Mr. *Druce*, for the husband:—

The property is not subject to the covenant. There can be no doubt as to the construction of the covenant. It cannot mean everything taken by the husband and wife, and everything taken by either of them in her right, because the recital shows that the covenant was to operate only on the wife's future property, and not on anything taken by the husband otherwise than in her right. Then does this devise to husband and wife as joint tenants consist of property taken in her right? *Atcheson v. Atcheson* is conclusive on this point; and as to the course there taken to protect the wife's right by survivorship, that, if correct at all, could only be followed in a suit to execute *Joseph Bell's* will, and not by applying

(a) Page 131. (b) Page 231. (c) 11 Beav. 485.

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 Argument.

a covenant which has no application. It is clear that the interest is as much the husband's as the wife's ; and as there is no power of severance, there is nothing that can be settled : *Moffatt v. Bunnie* (a), *Warrington v. Warrington* (b). Nor can you speculate as to the motive of the gift : *Cole v. Wade* (c).

Mr. Osborne, Q.C. and Mr. W. W. Cooper, for the Trustee :—

The property is within the scope and intention of the covenant. In *Atcheson v. Atcheson*, the motive of the gift was the husband's merit ; and that may have induced the Court to treat it as not being an acquisition in right of the wife. Assume that the husband and wife take by entireties, but if so the wife is interested in the whole ; and as it cannot be severed, the whole must be settled. But here the form of the gift is in joint tenancy ; and at any rate the doctrine laid down by *Preston* will not apply to the personal estate : *Ripley v. Woods* (d), *Att. Gen. v. Bacchus* (e).

Mr. Rollt, in reply :—

The covenant includes only property falling into possession during the coverture, otherwise it would be necessary to sell contingent reversions, which is never the purpose of covenants of this description. The limitation of value measured by a money-sum would be wholly inapplicable to a contingent reversion. At any rate, such interests as the wife's right of survivorship are not within the terms of this covenant. Such a right is not even a reversion, any more than the interest of a man's expectant heir. It is a mere continuation of the same estate which the husband and wife during the coverture held as one person.

(a) 18 Beav. 211. (b) 2 Hare 54. (c) 16 Ves. 27.
 (d) 2 Sim. 165. (e) 9 Price, 30.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think this property is not within either the words or the intent of the covenant. As to the words, coupling the recital with the covenant (and indeed without the recital there would be little room for doubt), it is clearly limited to property which should be acquired in right of the wife. Three classes of property are comprised:—First, what the husband and wife take in her right; secondly, what the husband takes in her right; and thirdly, what the wife takes; and there is moreover an exception of all life interests and separate property of the wife.

Now the property in question comes within neither of these categories. It is real and personal property given by the will of the lady's brother to the husband and wife, as effectually to one as to the other, and in legal effect to the pair as one person. That cannot be called property taken in her right, and is certainly not within the language of the covenant in its literal meaning. Then as to the intent, it might be suggested that the degree of interest which the wife takes in this gift is property within the spirit of the covenant. But looking to the whole scope and intent of covenants of this kind (and specially of this particular covenant), the natural conclusion is, that they are meant to apply only to what falls in during the coverture, a view which is strengthened in this case by the exclusion of life interests and separate property. The object appears to be, to leave the wife at liberty to deal with anything which she may take, free from the liabilities of coverture, and to settle only what would be subject to the marital power. Now the right of the wife under this gift amounts to nothing more than the right of survivorship, she and her husband taking during the coverture as one person, and the control belonging to him. Therefore, when she acquires any beneficial ownership in the property the coverture

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will be determined, and the marital control will have ceased; and this interest is really in the nature of separate property, within the spirit of this covenant. So if we consider the mode of alienation, the wife could never part with such an interest in realty, except by means of a fine or its modern equivalent, and not with the personalty, because it is of a reversionary nature, or rather would be, if it were proper to speak of her interest as a distinct estate at all. I am of opinion, therefore, that the property is neither within the letter nor the spirit of the covenant; and there will be a declaration accordingly.

1 Law Rep. 69, 325.
Nov. 16th.

Railway Com-
pany—Bor-
rowing Powers
—Lloyd's
Bonds—Prac-
tice—Plead-
ing.

A Railway Company, after exhausting their Parliamentary borrowing powers, issued bonds in the form known as Lloyd's Bonds, viz. an acknowledgment of debt and a covenant to pay, with interest, on a future day—partly to a contractor and partly to persons who supplied a Parliamentary deposit. At the time of the issue the Company was promoting or contemplating a bill, which was ultimately passed, to enable them to raise further share and loan capital:—*Held*, on demurrer, that these facts would not justify the Court in declaring the bonds illegal.

Seem, that a Company intending to issue such bonds to raise a Parliamentary deposit would be restrained before the money was raised; though, after the money had been raised and applied, the Court would not interfere.

Whether such bonds would be valid if issued for the purpose of evading the limitations of a Company's borrowing powers—*Quare*.

A suit by a shareholder to restrain an illegal act must be in form on behalf of all the Shareholders, though it may be sustained notwithstanding their opposition.

WHITE v. CARMARTHEN, &c., RAILWAY COMPANY.

THIS case came on upon demurrer. The Bill was filed by a single shareholder against the Company, the directors, and a contractor—the material statements being as follows:—

The Company was authorised to raise £300,000 share, and £80,000 loan capital; which sums were reduced by a subsequent Act to £200,000 share, and £60,000 loan capital; and they had raised £174,000 by shares, and the whole £60,000 by Parliamentary debentures.

The sums so raised were insufficient for carrying out the objects of the Company; and being unable to raise

and partly to persons who supplied a Parliamentary deposit. At the time of the issue the Company was promoting or contemplating a bill, which was ultimately passed, to enable them to raise further share and loan capital:—*Held*, on demurrer, that these facts would not justify the Court in declaring the bonds illegal.

Seem, that a Company intending to issue such bonds to raise a Parliamentary deposit would be restrained before the money was raised; though, after the money had been raised and applied, the Court would not interfere.

Whether such bonds would be valid if issued for the purpose of evading the limitations of a Company's borrowing powers—*Quare*.

A suit by a shareholder to restrain an illegal act must be in form on behalf of all the Shareholders, though it may be sustained notwithstanding their opposition.

any more capital by shares, "the directors devised a scheme for evading the restriction contained in their Act as to the amount of money the Company was empowered to borrow; and in pursuance of such scheme" proposed to pay the contractor for the railway the amount of his contracts by bonds, in the following form:—

1863.
 WHITE
 v.
 CARMARTHEN
 &c.
 RAILWAY
 COMPANY.
 —
Statement.

The Carmarthen &c., Railway Company.

No. Bond for £

The *Carmarthen Railway Company* do hereby acknowledge that they stand indebted to in the sum of £ for money due and owing from the Company to the said . And the Company, for themselves, their successors, and assigns, covenant with the said , his executors, administrators, and assigns, to pay the said sum of £ upon the day of , with interest thereon at the rate of £5 per cent. per annum from the date hereof until payment. Such interest to be payable half-yearly, upon the day of and the day of in each year. Given under the common seal of the Company the day of

A. B., *Secretary.*

(L. S.)

N.B.—On production of this bond the interest, when due, will be paid at the offices of the Company.

The contractor, before agreeing to accept payment in this form, ascertained, as the fact was, that the bonds could only be negotiated at a discount of from £20 to £25 per cent., and made his contracts accordingly; the effect of which was that the Company paid a larger sum for the execution of its works than would have been paid in money, and the profits of the Company became charged with a wholly unauthorised debt.

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 WHITE
 v.
 CARMARTHEN
 &c.
 RAILWAY
 COMPANY.
 Statement.

Bonds were accordingly issued to the Defendant *Holden*, the contractor; and in January, 1862, other bonds in the same form were issued to raise the money required as a Parliamentary deposit on a bill promoted by the Company for additional capital and borrowing powers, and the money so obtained was used as the deposit.

The dates of the issues to *Holden* and the days of payment of the bonds were not stated.

In the year 1862, the Company obtained an Act empowering them to raise further share and loan capital, but no steps had since been taken for the purpose of raising such capital; and in lieu thereof, the directors were proceeding to carry out their works by means of such bonds as aforesaid.

The Bill also alleged that the directors intended to issue more bonds in evasion of the restrictions on their borrowing powers, and prayed a declaration that the issue of the bonds was illegal, and an injunction.

To this Bill the Defendants demurred.

Argument.

Mr. Rolt, Q.C., Mr. Giffard, Q.C., and Mr. Locock Webb, for the demurrer:—

The Company can lawfully incur debt for work or other legitimate purposes of their Acts, and may then execute a document acknowledging the debt, and covenanting to pay it. But whatever irregularity there might be in the course taken, it is too late to impeach it after the Company have had the benefit of the transaction: *Baker's case* (a), *Troup's case* (b), *Agar v. Athenæum Society* (c). Then the Bill is demurrable for not being on behalf of all shareholders: *Mozley v. Alston* (d).

Sir H. Cairns, Q.C., and Mr. Roxburgh, for the Bill:—

As to the technical objection, it is settled that any one shareholder has a right to restrain an illegal act on the (a) 1 Dr. & Sm. 55. (b) 29 Beav. 353. (c) 6 W. R. 277. (d) 1 Ph. 790.

part of the directors, even though all the other shareholders dissent. Therefore, where illegality is alleged, it is no objection that the Bill is not on behalf of all. The difficulty at any rate was removed by the Chancery Improvement Act, which enabled any one cestui que trust to sue his trustee without joining the others interested, and to give them notice of the decree.

As to the substance of the case, the allegations amount to this, that the Company, having a limited borrowing power, which they had exhausted, issued these bonds for the purpose of evading the restriction in their Act. If that is not illegal, it is a farce to put any limit on borrowing powers; and the serious injury to the shareholders is obvious when the bonds could only be issued at a heavy discount.

1863.
WHITE
v.
CARMARTHEN
&c.
RAILWAY
COMPANY.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think this demurrer must be allowed. Without expressing any general opinion as to the legality of issuing bonds of this description, I cannot resist the conclusion that the equity is not stated with sufficient clearness to sustain this Bill. There is no doubt a statement that the issue of the bonds was a scheme for evading the Company's Act; but a general allegation of that kind will not sustain a Bill, unless the circumstances appearing on the face of the Bill are such as to show that the issue of the bonds really was an evasion of the Act. The facts averred are, that the Company were empowered by their original Act to raise £300,000 of share capital, and to borrow a sum not exceeding £80,000; and that by a subsequent Act the capital was reduced to £200,000, and the borrowing powers to £60,000. Then it is stated that a considerable amount of capital was subscribed and partially paid up, and that the full amount of £60,000 was borrowed. Then the seventh paragraph states what

Judgment.

1863.
WHITE
v.
CARMARTHEN
&c.
RAILWAY
COMPANY.
Judgment.

is called the scheme for evading the Act; it avers that the sums raised as capital and by loans were insufficient for carrying into effect the objects of the Company; and that having spent the whole of the paid up capital and the amount raised by loans, the Company purposed to pay the contractors for the work to be done, by bonds payable at certain deferred periods, with interest in the meantime.

As against the pleader, I must assume that the bonds were only made payable after the lapse of a considerable interval of time, sufficient to enable the contractor in the meantime to get forward with the works; so that there would be profits out of which the payments might come. The date of the transaction is not precisely given, but we are told on the face of the Bill that the Company applied to Parliament in the year 1862 for power to raise further capital. Now if it be possible to suppose any state of circumstances consistent with the allegations of the Bill, which would make the issue of these bonds lawful, the demurrer must be allowed. It is quite consistent with all the averments to assume that the Company, being about to apply to Parliament in 1862 for further powers of raising money, and having a reasonable expectation of success (as indeed they must have had, for the application was successful), and being anxious to commence their works in the meantime, were desirous of making a bargain with the contractor that he should commence the works at once, to be paid out of the moneys which it was expected the Company would be authorised to raise. With this object, and for the purpose of giving the contractor some evidence of the debts coming due to him, the Company may have arranged that the contractor should be content with a deferred payment after the expected powers should have been obtained; and that in the meantime these bonds should be issued as evidence

of his claim against the Company. If that was the real course of the transaction (and it is quite consistent with the Bill to suppose that it was,) I am not prepared to say that the Company have exceeded their powers so as to justify the interference of this Court in the manner prayed for.

1863:
WHITE
v.
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&C.
RAILWAY
COMPANY.
Judgment.

It is alleged, it is true, that the issue of these bonds was a very bad way of raising money, and very prejudicial to the interests of the Company; but it is clear, from *Foss v. Harbottle*, that this is no ground for the interposition of the Court, it being a matter of internal arrangement, as to which the shareholders must protect their own interests.

The only question before me is, whether this mode of raising money is one which the Company, under the circumstances, were not authorised to adopt. The point which seemed to me most open to doubt is that which relates to the form of the bond. The Companies Clauses Act (8 & 9 Vict. c. 16, s. 41) enacts that every bond may be according to the form in the schedule to the Act, or to the like effect; and that is a form by which the Company, by virtue of their special Act, in consideration of a specified sum, bind themselves to pay on a certain day, with interest in the meantime. The form of the bond set out in the Bill is simply an acknowledgment of debt without reference to the special Act or to the consideration, and a covenant to pay on a fixed day, with interest in the meantime. The question is, whether this is to be regarded not as a mere covenant to pay a valid debt (which would be clearly legal), but as a device for issuing more bonds than the Company's Act authorises. I think, as the facts are stated, there is not enough to warrant the conclusion that it is such a device. The Company, being about to apply for further borrowing

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 WHITE
 v.
 CARMARTHEN
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 COMPANY.
Judgment.

powers, engage to give their contractor a bond for a deferred payment. Upon that alone I do not think I can hold that the bond is necessarily a breach of the statute.

The other point appears to me less strong against the Company. If they were now about to apply for an Act, and to issue such bonds for raising the money required for the Parliamentary deposit, it is possible that the Court might restrain them from so doing; but that is very different from interfering after the money has been raised and employed, *bonâ fide* and successfully, for the purpose of obtaining the further Act. After money has been advanced to the Company on the faith of these bonds, and used by the Company as a deposit, and after the new Act has been by these means obtained, it would be impossible to say that the money is not to be returned to the persons who advanced it.

Then as to the prayer to restrain the future issue of such bonds, I must read that as applying only to the issue to the contractor, and not to any issue for the purpose of providing a deposit, no impending application to Parliament being averred. I have already dealt with that part of the case, and I cannot say, on the allegations of this Bill, that the issue of such bonds is an act beyond the powers of the directors.

I am also of opinion that the Plaintiff cannot maintain this Bill without suing on behalf of all the shareholders; though, if he made out a case of illegality, it would not be necessary that they should, in fact, concur with him, because the Court assumes that all shareholders are interested in preventing illegality. The suggestion, that the Chancery Improvement Act (15 & 16 Vict. c. 86, s. 42), enables a single shareholder to sue the directors

as trustees without joining the other shareholders, is, I think, unfounded, the Act not contemplating any case of this description. It would be most improper to allow a single shareholder to file a Bill of this character with the view of summoning the other shareholders in Chambers, after a decree.

On both grounds, therefore, the demurrer must be allowed.

DEMURRER allowed with costs. LEAVE to amend.

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WHITE
v.
CARMARTHEN
&c.
RAILWAY
COMPANY.
Judgment.

Minute.

NOTE.—This suit was afterwards compromised.

2 Law Rep. 35: 88-338.

STEELE v. STUART.

THIS was an application to discharge an order for service on two Defendants in *Scotland*.

The Plaintiff carried on business in *Liverpool*, and the two *Scotch* Defendants, who carried on business at *Kirkcaldy*, of the firm of *Staig & Stuart*, were agents of *Towns & Co.*, a firm in *Sydney*. The Plaintiff was in the habit of shipping goods to *Towns & Co.*, and drawing bills against them through *Staig & Stuart*. *Staig & Stuart* had directed *Towns & Co.* to remit certain proceeds of the Plaintiff's shipments to their *London* bankers and agents, Messrs. *Stuart Brothers*, who were also Defendants; and certain letters were set out in the Bill, in which it was stated that these proceeds were in the hands of the *London* bankers; but the Bill contained no distinct averment of the fact. *Staig & Stuart* having

Vict. c. 52, and of the course of practice founded upon them. Under these Orders the Court has discretion to refuse to order service abroad, and will do so, not only when, as in *Cookney v. Anderson*, the whole subject matter is beyond the jurisdiction, but also when there are no means of effectually reaching the parties to the suit.

Dec. 17th, 21st.

Practice—
Service out of
Jurisdiction—
Consolidated
Order X, rule
7—Stat. 2
Will. 4, c. 33—
4 & 5 Will. 4,
c. 82—3 & 4
Vict. c. 94—
and 4 & 5 Vict.
c. 52.

The Orders of
1845 (Conso-
lidated Order
X, rule 7), as
to service on
Defendants
out of the ju-
risdiction, are
not limited by
the statutes 2
Will. 4, c. 33,
and 4 & 5 Will.
4, c. 82, but
have validity
by force of the
3 & 4 Vict.
c. 94, and 4 & 5

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STEELE
v.
STUART.

failed, the Bill prayed that the said proceeds might be declared to be applicable to cover the bills drawn in the course of business, as above described.

Statement.

An order for service on the two *Scotch* Defendants was obtained, and a motion was now made to discharge it.

Argument.

Mr. *Whitehouse*, for the motion :—

The power of the Court to order service abroad is given only by the statutes 2 Will. 4, c. 33 and 4 & 5 Will. 4, c. 82, and is limited by them to cases affecting "land in *England* and *Ireland* respectively, or any charge, lien, judgment, or incumbrance thereon; or any money invested in any Government or other public stock or public shares in public companies or concerns, or concerning the dividends or produce thereof." The Consolidated Order X., rule 7, must be read as confined within the same limits as has been expressly held in *Cookney v. Anderson* (a).

Mr. *Druce*, for the Plaintiff :—

The object of the suit is to compel a *London* banking house to apply money in their hands for the purpose to which the money has been duly appropriated. The bankers are Defendants, and the Court, therefore, has jurisdiction over the subject matter of the suit. This relieves me from *Cookney v. Anderson*, where there was no jurisdiction at all, the subject-matter and all the Defendants being in *Scotland*. *Whitmore v. Ryan* (b) is a distinct authority that the 33rd Order of May, 1845, (which is re-enacted as Order X., rule 7, of the Consolidated Orders), gave the Court jurisdiction, in its discretion, to order service abroad in all cases, whether they did or did not fall within the words of the statutes of

(a) 11 W. R. 628.

(b) 4 Hare, 612.

Will. 4; and that has been the practice from 1846 to the present time. This case has never been over-ruled. [He also cited *Kirwan v. Daniel (a)*, *Mitford's Pleadings (b)*.]

1868.
STEELE
v.
STUART.
Argument.

Mr. *Whitehouse* replied.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case is one of considerable importance with respect to the general practice of the Court; in coming to a conclusion on which it is necessary to have regard to what has been constantly done for a long series of years. *

Judgment.

The question is, whether or not an order for service on two Defendants in *Scotland* ought to be discharged. The Bill claims a lien on moneys in the hands of *Stuart Brothers*, who are the agents of the two *Scotch* Defendants. The contract is thus stated:—The Plaintiff carries on business at *Liverpool*. Two of the Defendants carry on business at *Sydney* under the firm of *Towns & Co.* The firm of *Staig & Stuart* (who are the two *Scotch* Defendants) carried on business at *Kirkaldy*, in *Scotland*, and were the agents of *Towns & Co.* The Defendants *James Stuart* and *J. Gordon Stuart* carry on business in *London* under the firm of *Stuart Brothers*, and are the bankers and agents of *Staig & Stuart*.

The Bill alleges that the Plaintiff, on shipping goods to *Towns & Co.*, sent them the bills of lading, with instructions to sell on account of the Plaintiff and remit the proceeds through *Staig & Stuart*. The Plaintiff advised *Staig & Stuart* of the shipments, and sent

(a) 7 Hare 347.

(b) Page 164.

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 v.
 STUART.
 —
Judgment.

them one or two bills of lading of the set which they ordinarily forwarded to *Towns & Co.* The Plaintiff, or *Staig & Stuart*, drew against the shipments, and the drafts were discounted by *Staig & Stuart*, and the proceeds remitted to the Plaintiff. The averments amount to this: that the proceeds of the goods were, according to the course of business, to be set apart to cover the bills. Then the 19th paragraph suggests, though it does not distinctly aver, that *Towns & Co.* had, at the request of *Staig & Stuart*, remitted out of the proceeds to *Stuart Brothers* certain sums to meet the bills, and that these were still in their hands, as the agents of *Staig & Stuart*, when *Staig & Stuart* suspended payment.

I think it would be impossible for me to overrule the great weight of authority for the existing practice of the Court. It is to be observed, that in *Whitmore v. Ryan* (a), which was decided as long ago as 1846, almost every argument was used which is to be found in the judgment of the Lord Chancellor. Nevertheless, the contention against the jurisdiction did not prevail. The General Orders made in 1845, on which this decision was come to, were made under the powers of the 3rd & 4th Vict. c. 94 and the 4th & 5th Vict. c. 52, by which statutes all rules and orders to be made by the Court of Chancery were to be laid before Parliament. By the second of these statutes, the rules were to be valid unless objected to by either House of Parliament within thirty-six days. There was an extraordinary sanction thus given to these rules. Parliament reserved to itself the right of judging of these rules; and either House, by a simple resolution, might annihilate them. The rules framed in 1845 passed this ordeal; and in 1846 Vice-Chancellor *Wigram* decided that the rules were valid to an

(a) 4 Hare, 612.

extent altogether beyond the limits of the Acts of Will. 4. This decision has been uniformly acted on by the Court for seventeen years.

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STUART.
Judgment.

In that state of things this Court is too weak to overthrow a practice so firmly established. It should be observed too (and this perhaps was one reason why Parliament did not think fit to interfere with the rules,) that they were merely permissive, and that the Court in several cases has refused to exercise the jurisdiction given by them. Moreover, these Orders were re-enacted by all the judges under the Chancellorship of Lord Campbell. The decision in *Cookney v. Anderson* amounts only to this (though the reasons assigned, no doubt, go much deeper), that the case was one in which the Court never had jurisdiction over the subject matter of the suit. The Lord Chancellor, however, puts it on higher grounds, and says that there is no power in any case beyond what is expressly conferred by the terms of the Acts of Will. 4. There are two possible classes of cases, one where the Court has no jurisdiction at all; the other where it declines to exercise it, because it has no means of reaching the parties and enforcing its decrees. The Act was never intended to give the Court of Chancery authority to bring before it matters of common law, or other subjects foreign to its jurisdiction. Any such attempt would be invalid; but the rules of 1845 are of a different character, and have received a remarkable sanction from the acquiescence of Parliament. We have, moreover, the decision of one of the judges long acquiesced in, the adoption of the rules by Lord Campbell and all the judges in the Consolidated Orders, and all that done before the decision of *Cookney v. Anderson*. I have thought it right, on account of the respect which is due to the judgment of the Lord Chancellor, to explain why I feel unable to depart from the established course of

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 v.
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 —
Judgment.

practice; but the Court has a discretion under the Orders, and in this particular case it appears to me that the litigation against these Defendants is essentially *Scotch*. The Plaintiff chooses to deal with a *Scotch* house; and then contends that they are not to avail themselves of the bills, on the sole ground that the remittances are in the hands of their *London* agents; and if that were distinctly averred, the case might fall within the principle of *Maunder v. Lloyd (a)*. But I find no sufficient averment that the property is here in *England*.

I shall therefore discharge the order for service, without costs, but only on the ground that I do not consider it expedient, as a matter of discretion, to allow the order to go in the present state of the averments, leaving it open to the Plaintiff to make such application as he may think fit, when the matter shall have been put in a more complete shape.

Dec. 9th, 11th,
 21st.

*Will—Con-
 struction—
 Conflict of
 Laws—Child
 —Foreign
 Domicil—
 Legitimation.*

Gift by the will of a testator domiciled in *England*, of a sum of £5000, in trust for A. for life, remainder to his wife for life, remainder among his children at 21.

After the death of the testator, A., having acquired a *French* domicil, had a daughter by a *French* lady, whom he subsequently married in *France*, and legitimated the child according to the *French* law, by a contemporaneous acknowledgment:—*Held*, that the term "children" in the will must be construed according to the law of *England*, and that the daughter was not entitled to any interest in the £5000

1 Law Rep. 89: 25-2.-14 Ch. D. 619
 BOYES v. BEDALE.

THIS case came on upon further consideration.

The testator, *James Olegg*, by his will, dated the 13th of March, 1843, bequeathed £5000 to trustees, upon trust for his nephew *Edmund Burns Olegg* for life, and after his decease, upon trust for his wife for life for her separate use, and after the death of the survivor to divide the principal among his children attaining the age of twenty-one years, and if only one child, to that only child. The testator died a domiciled *Englishman*, on the 19th of August, 1843.

(a) 2 J. & H. 718.

Edmund Burns Clegg, who was also originally domiciled in *England*, resided chiefly in *France*, from the year 1840, and ultimately, some time before the year 1852, acquired a *French* domicile. In 1852, he formed a connection with a *French* lady, the Defendant *Marie Anne Croc* or *Clegg*, by whom he had a daughter the Defendant *Catharine Edmée Croc* or *Clegg*, born on the 17th of November, 1853. On the 11th of September, 1858, *Edmund Burns Clegg* married *Marie Anne Croc* in *France*, and acknowledged the daughter, and thereby legitimated her according to the law of *France*.

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v.
BEDALE.
Statement.

Edmund Burns Clegg died in 1859, and the question which now arose was, whether the Defendant *Catharine Edmée Croc* or *Clegg* was entitled to the £5000, there being no other child of *Edmund Burns Clegg*.

Mr. Rolt, Q.C., and Mr. G. L. Russell, for the Plaintiffs, the trustees of the will. Argument.

Mr. Daniel, Q.C., and Mr. Drewry for the widow and daughter of *E. B. Clegg* :—

There is no dispute about the marriage, and the right of the widow to the life interest is now admitted. Then the *French* domicile is clearly proved to have been acquired before either the birth or conception of the child; and the difficulty which arose in *Wright's Trusts* (a) before your Honor does not occur.

By the law of *France*, of which evidence is given, a marriage, with acknowledgment of a child previously born, legitimates the child; and the question of legitimacy, like all other questions of status, is governed by the law

(a) 2 K. & J. 595.

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 v.
 BEDALE.
 —
Argument.

of the domicile, i.e., in this case, by the law of *France*. This being a case of personalty, the nice distinctions between legitimacy as a matter of personal status and heirship, for the purpose of inheriting *English* land, do not apply. The only question is, was the Defendant the child of *E. B. Clegg*. The *English* law says that this question must be determined by the law of *France*, and the *French* law answers it in the affirmative.

[They also referred to *Lloyd v. Lloyd* (a), *Re Don's Estate* (b).]

Mr. James, Q.C., and Mr. Karlake, for the residuary legatee :—

This is not a question of status, to be governed by the law of domicile of the person, but a question of the construction of an *English* will, to be determined by the law of the testator's domicile. An *Englishman* making his will here must be presumed to use the word "children" in the sense which the law of his country gives to the word. The law of *France* does not give to a marriage the effect of legitimating a previously born child by relation to the time of birth, but only from the date of the marriage; the term by which such a child is designated, being not enfant légitime, but enfant naturel légitimé. At the testator's death, the Defendant, the daughter, was undoubtedly not a child within the meaning of the will; and no subsequent operation of the *French* law can give her that quality. If it could, and there had been other children who had acquired rights in the meantime, all these would be displaced by the supposed legitimization of this daughter. The children, to be entitled at all, must be entitled at birth. The same principle which determines that subsequent legitimization by a foreign law does not confer heirship to *English*

(a) 13 Beav. 401, n.

(b) 4 Drew. 194.

lands, or even the right to take as persona designata under a gift to the heir of *A.*, also determines that it cannot give the right of succession to personalty governed by *English* law, as this is, in consequence of the testator's domicile. The word "child" must have its natural meaning, and that in an *Englishman's* will is the meaning attached to it by the law of *England*.

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v.
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—
Argument.

[They cited *Anstruther v. Chalmer* (a), *Price v. Dewhurst* (b), *Reynolds v. Kortright* (c), *Watts v. Shrimpton* (d), *Munro v. Munro* (e).]

Mr. Daniel, in reply :—

The testator did not mean to prevent his nephew acquiring a foreign domicile; and when once that was acquired the consequences must follow with it.

The child had at its birth a capacity to become legitimate, and having become so, must be so regarded for all purposes.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Dec. 20th.
—
Judgment.

This case raises a question on the construction of the will of *James Ayton*, who died a domiciled *Englishman*.

The testator gave £5,000 to trustees, upon trust to pay the interest to his nephew *E. B. Olegg* for life, and after his decease to his wife for life, and after the decease of the survivor to the children of the nephew who should attain the age of twenty-one. The question which now arises is, whether the nephew left any child capable of taking under the will. In answer to the inquiry as to children, directed at the hearing, the Chief Clerk states

- (a) 2 Sim. 1. (b) 8 Sim. 279. (c) 18 Beav. 417.
(d) 21 Beav. 97. (e) 7 Cl. & F. 842.

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—
Judgment.

the facts I am about to mention, with the exception of the fact of domicil, which is proved by an affidavit now before me. It appears, then, that the nephew was domiciled in *France*, and that, while he was so domiciled, the child who now claims was conceived and born prior to the marriage which afterwards took place between the nephew and *Marie Anne Croc* the mother of the child. On the occasion of his marriage, Mr. *Clegg* made a declaration of his intention to legitimate the child, the effect of which, according to the law of *France*, was, that the child became legally his child. Under these circumstances, the question is raised whether this child, the Defendant *Catharine Edméas Croc*, is to be considered as a child of the testator's nephew within the meaning of the will.

In the case before me of *Wright's Trusts*, the question of construction was very slightly pressed. There I had to consider whether a child born out of wedlock, whose putative father was domiciled in *England* at the time of the birth, and in *France* at the time of the subsequent marriage with the mother, was legitimate in such a sense as to be entitled to share in a bequest to children contained in the will of an *English* testator; and it appeared to me clear upon the authorities, that the child could not be regarded as legitimate by the *English* law, or even by that of *France*, because the putative father had not acquired a *French* domicil at the time of the birth. I decided the case upon that point.

The present case raises a question to which I alluded in *Wright's Trusts*, though it was not necessary to decide it; and although there is no authority expressly in point, the whole current of decision leaves no doubt as to the principle to be applied.

The will must be construed according to the law of the testator's domicil. That is a proposition for which I

need refer to no authorities. It is enough to say, that nearly all of them are mentioned in the text and notes of the well-known work of Mr. Justice *Story*, who lays down the rule in these terms (a) : " Let us proceed," he says, " to the consideration of the rules by which wills and testaments are to be interpreted. And in the first place, in regard to wills and testaments of personal property:—In such cases, where the will or testament is made in the place of the domicile of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicile in which it is made. A will, therefore, made of personal estate in *England* is to be construed according to the meaning of the terms used by the law of *England*; and this rule equally applies whether the judicial inquiry as to its meaning and interpretation arises in *England* or in any other country." Then the learned author refers to *Trotter v. Trotter* (b), where the testator a *Scotchman* domiciled in *India* made his will there, and it was held that the terms must be interpreted by the law of *England* as prevailing in *India*. The Lord Chancellor (Lord *Lyndhurst*) referring to the argument that the law of the country where the will was made was to be resorted to only for the meaning of technical expressions, and not for the general interpretation, said, that it was impossible that such an opinion could be reasonably entertained, adding this statement of the law, " a will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile;" and pointed out the mischief that would arise if the rules of construction adopted in that country could be disregarded by the judges of a foreign court.

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—
Judgment.

These observations apply not only to technical rules of construction, but to the interpretation of the will generally. One example given by *Story* is that of the cur-

(a) § 479 a.

(b) 4 Bligh, N. S.; 502.

1863.
 BOYES
 v.
 BEDALE.
 —
 Judgment.

rency in which legacies are payable, which is that of the country where the will is made and the testator domiciled. If a testator domiciled in *Canada* left a legacy of £100 to his son *John*, that would mean £100 currency, and not £100 sterling, although *John* might himself be domiciled in *England*. So here the testator, giving a legacy to the child of *H. B. Olegg*, must be taken to mean a child in the sense in which the law of *England* understands the term.

The case is not even helped out by any reference in the will to the fact of the nephew being domiciled or resident in *France*; and indeed it seems (though I do not think that it materially affects the case), that Mr. *Olegg* had not acquired his *French* domicile at the date of the will. The general rule of construction, then, being such as I have stated, it only remains to see whether any intention to use the word "children" in a different sense is to be traced in the will. But when the testator speaks of the children of his nephew, he does so simpliciter, and he must mean such persons as the law of *England* would regard as the nephew's children. The testator cannot be assumed to know that there is any other kind of child extant. On the same principle, when in an *English* will the word "heirs" is used, an *American* Court having to construe the will inquires what the word "heirs" signifies according to *English* law, and an authority to that effect is cited by *Story* (a). A case of some importance in illustration of the same principle is *Anstruther v. Othmer* (b). There a *Scotch* lady, after having acquired a domicile here, when on a visit to *Scotland* made a will entirely in the *Scotch* form, and died in *England*. It so happened, that the universal legatee died in the lifetime of the testatrix, and according to *Scotch* law the will would have passed the interest

(a) § 479 c, note.

(b) 2 Sim. 1.

designed for him by the will to his representative, notwithstanding his death in the testatrix's lifetime. But it was held, that the law of *England* must govern the construction, and that the gift consequently lapsed.

1863.
 BOYES
 v.
 BEDALE.
 Judgment.

This decision is referred to with approval in *Yates v. Thomson (a)* (which is also among the cases noticed by *Story*). Lord *Brougham* in the course of the Appellant's argument (p. 569) observed that by the *English* law of evidence the probate alone would be admissible; and added, "it does not follow that the case is to be decided by *English* law;" upon which Dr. *Lushington*, continuing his argument, said "I submit that the will of a person domiciled in *England*, made according to the law of *England*, governs the distribution of the testator's personal estate all over the world, citing *Anstruther v. Chalmer*;" and Lord *Brougham* rejoined:—"The law of *England* must be looked to for the *lex domicilii* for the construction as well as the effect of a will; and Sir *J. Leach's* decision in *Anstruther v. Chalmer* would be a grave authority to show it was so." We find that case, therefore, treated as deserving the greatest respect. The rule applied is in fact nothing more than a branch of the larger rule by which the *lex loci contractus vel actus* is held to govern questions of construction, and it rests on the common sense view that a testator may well suppose that his language is to bear the sense which it has according to the law of the country where he is domiciled.

I take it that the language of the Statute of Distributions would be dealt with in the same way. If an intestate dies domiciled in *England* the division of his property is governed throughout by *English* law, and no person could take by representation under that statute unless legitimate by the law of *England*.

(a) 3 Cl. & F. 544.

1863.
 BOYES
 v.
 BEDALE.
 —
Judgment.

The only doubt is how far it is proper, during the mother's lifetime, to decide anything as to the interest of the child; but, as she is a party to the suit, I think the best course will be to dismiss the bill as against her, giving the costs out of the fund, it being a question of administration.

Minute.
 —

THE Court being of opinion that the infant Defendant takes no interest under the will, dismiss the bill against her. Costs out of the fund.

Nov. 5th.
Title-deeds—
Exceptions—
Answer—
Production—
Covenant to
produce—
Tender of
Costs.

BETHELL v. CASSON.

THIS case came on upon exceptions to the Defendants' answer.

Where a Defendant holds a covenant for the production of deeds for the maintenance and manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the object of which is to show that a disputed piece of land is not comprised in the Defendant's title.

The Plaintiff was lessee of certain minerals, and claimed to be entitled to the minerals under a piece of land which the Defendants claimed to hold by a paramount title. The earlier title deeds of the Defendants were in the hands of a third person, who had covenanted to produce them to and at the cost of the Defendants for the maintenance and manifestation of their title.

The Bill alleged that these deeds would show that the land in dispute was not comprised in the Defendants' estate, and interrogated the Defendants as to the deeds, and required them to set them out; and the Defendants, by their answer, stated to the above effect, and insisted

Seemle, also, that it would be a fraud on the covenant for the covenantor to claim the production of the deeds, and then use them for any such purpose.

Seemle, also, that a Defendant is not bound to incur costs in obtaining production of deeds for the purpose of giving discovery to the Plaintiff.

that as the Plaintiff's object was to impugn their title, they had no right to call for the deeds under the covenant, and could not set them out.

1863.
BETHELL
v.
CARSON.

Argument.

Mr. James, Q.C., and Mr. Hanson, for the exceptions:—

The question is, whether a particular plot is part of the Defendants' farm, or of the waste, the minerals under which are leased to the Plaintiff. The Bill states that the early title deeds would show what parcels the Defendants are entitled to, and that they do not include the disputed land. If we impeached his title, that might be a reason for declining to produce the deeds; but we admit his title, and only say that it has nothing to do with this particular piece of land. The Defendants, therefore, have it in their power to procure these deeds, and are bound to give all the information which is in their power, and, at any rate, ought to have applied to the covenantors for their production, which they do not profess to have done: *Taylor v. Rundell (a)*.

Mr. Rolt, Q.C., and Mr. Osborne Morgan, for the Defendants, were not called upon.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If the right claimed by the Plaintiff existed, the case would have occurred a thousand times; but I never before heard of an application that a Defendant holding such a covenant as this should produce his deeds to a Plaintiff in a suit of this description. Neither can I recall any instance in which a Defendant, averring to the best of his belief, and setting out documents in his possession or power, has been considered bound to include docu-

Judgment.

(a) Cr. & Ph. 104.

1863.
BETHELL
v.
CASBON.

Judgment.

ments and to furnish information which he cannot himself obtain, except by enforcing, at his own costs, a covenant for production.

It is true, that, in some cases, it has been said that a Defendant is bound to find the means of paying a solicitor, to enable him to put in an answer; but that is very different from requiring him to pay for the production of deeds, in order to furnish them to the Plaintiff. These deeds are in the possession of a person who has covenanted to produce them to the Defendants for the purpose of defending and manifesting their title. But the case before me is this: The Plaintiff alleges that the deeds, when produced, will fall short of manifesting the title which the Defendants claim under them, and that he desires to see them for the purpose of ascertaining that they do not convey so extensive a title as the Defendants claim. The covenant was assuredly never entered into for any such purpose as this, to compel the covenantor to produce the deeds for the benefit of any third person, who might question the extent of the lands claimed to be conveyed by them. By such a production, much collateral damage might ensue to the covenantor. If the Defendants applied for and obtained production of the deeds, under the pretence of wanting them for the purposes of the covenant, that is to say, for the manifestation of their own title, and then used them for the information of the Plaintiff, it would be a fraud upon the purpose of the covenant. I cannot compel a Defendant to expend his money in obtaining information, which, when he had obtained it, it would be improper for him to disclose. The exceptions must therefore be disallowed.

1853.

Dec. 4th.

Practice—
Parties—Charity—In-
quiry—Costs.

On an Information and Bill to establish a charity rent-charge against certain lands, the owners of which had paid the whole of the charge from 1818 to 1853, the Defendants, by their answer, stated that the owners of other lands, some of whom they pointed out, who were not parties to the said suit, were jointly liable:—*Held*, that this was no bar to a decree, and that the costs of an inquiry on the subject must be borne by the Defendants.

ATTORNEY-GENERAL v. NAYLOR.

THIS was an Information and Bill to establish a rent-charge of £10 a-year for stipends of curates in *Holy Island* and four other parishes. The title to the rent-charge was disputed by the Defendants, but, in the view of the Court, was established by the evidence. The Defendants also, by their answer, took an objection that the owners of other lands, jointly liable to the charge, some of whom they pointed out, were not made parties to the suit; and considerable evidence was given in support of this allegation.

It appeared upon the evidence that the Defendants' predecessors in title had paid the whole charge from 1818 to 1853. The other points raised in the suit were not of a nature to call for a report.

Mr. *Rolt*, Q.C., and Mr. *Lindley*, for the Information and Bill, contended that it was not necessary in a charity suit to make all the persons liable parties: *Attorney-General v. Shelly* (a), *Attorney-General v. Wyburch* (b), *Attorney-General v. Jackson* (c).

Sir *H. Cairns*, Q.C., and Mr. *North*, for the Defendants:—

We do not dispute, that, where the other persons liable are unknown, a charity information may be filed against the owners of part of the lands subject to the charge. That was the case of *Attorney-General v. Jackson*. But where the Defendants point out the other persons liable, the informant and relators are bound to add them as

(a) 1 Salk. 162.

(b) 1 P. Wms. 599.

(c) 11 Ves. 365.

1868.
 ATTORNEY-
 GENERAL
 v.
 NAYLOR.
 —
Argument.

Defendants. The alleged payments by a predecessor do not justify a presumption that our lands are exclusively liable.

Mr. *Lindley* replied.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

[After discussing the evidence of the charge, which his Honor held to be sufficient, said :] Then what is the rule in suits of this kind, where you find certain lands clearly liable as part of the property charged in favor of a charity, and where there is considerable evidence to show that other property, the owners of which are not parties to the suit, is also liable.

Lord *Eldon's* conclusion in *Attorney-General v. Jackson* appears to be this : “that although upon a Bill to establish a rent-charge (not for a charity), all the persons whose estates are liable must be brought before the Court, the strict rule was relaxed in charity cases ; and in commenting on the singular terms in which the practice is stated in the report of *Attorney-General v. Shelly*, that the terre-tenants may, if they seek a contribution, undertake to make them parties to the information, or help themselves by such course as they think fit,” Lord *Eldon* observes, that the rule must mean that if the Defendants insist that there shall be other parties, and can point out who they are, then they may be made parties ; but that, if they are unknown, there can be no undertaking by the terre-tenants unless they have the right to pray an inquiry that all may be made parties before payment is compelled ; and Lord *Eldon*, in a subsequent part of the judgment says, that if there is before the Court a party who in respect of his land is liable to the rent, and the

answer sets up that some other unknown persons are liable in respect of other lands, the Court will not stop for want of parties, but will go on to ascertain whether the actual Defendants are liable, reserving the consideration of what inquiries should be directed as to the other lands. The fair meaning of the whole judgment is, that if a charity has a right to lay hold of particular property, the Court will make a decree, adding an inquiry as to the other persons alleged to be liable; but the costs of such an inquiry must be borne by the Defendants, and ought not to be thrown on the persons asking the relief. The proper decree is therefore a declaration as to the liability of the Defendants, and an inquiry on their request as to the other persons alleged to be liable.

1863.
 ATTORNEY-
 GENERAL
 v.
 NAYLOR.
 Judgment.

It is in evidence in this case that the predecessors in title of the Defendants, for a period of thirty or forty years, took upon themselves the payment of the whole charge; and that fact removes all doubt as to the question by whom the costs of the inquiry should be borne. The charity have no concern with the question whether there was or was not any covenant of indemnity between the owners of the different lands; but it does not appear that the payments were so made under any such covenant. The Defendants, however, are entitled, if they ask it, to have the aid of the Court to assist them in discovering whether any other persons are liable to contribution.

DECLARE the lands of the Defendants liable to the rent-charge; and, the Attorney-General and Plaintiffs not asking any inquiry as to other property chargeable, let an inquiry be made at the request of the Defendants, whether any other and what property is chargeable, and in whose possession the same is, and what is the value thereof.

Minute.

1863.

ATTORNEY-
GENERAL;
v.
NAYLOR.

Account of arrears from filing of Information, the amount to be paid by the Defendants without prejudice to their right of recovering any portion from the owners of other property, if any, subject to the same charge.

Minute.

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See PLEADING, 4.

AMBASSADOR.

Certain securities were deposited by the Plaintiffs in the Bank of *England* in the name of the Ambassador of a foreign state, in order to secure the performance of a contract between the Plaintiffs and the foreign Government. The Ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by the Plaintiffs, which they denied under the circumstances to be such breach:—*Held*, that it was not competent for the Plaintiffs to move against the Ambassador; but that an interim injunction might be granted against the Bank to restrain them from parting with the fund; and that, under this order, the Bank would be protected against any proceedings by the Ambassador. *Gladstone v. Musurus Bey*, 405

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But in a company carried on under a deed of settlement and bye laws, directing that the profits should be divided half-yearly, such dividends to be paid in two specified months:—*Held*, that such dividends were apportionable under the Act with reference to the days on which they were made payable. *Re Maxwell's Trusts*, 610

See LANDS CLAUSES ACT, 1.

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Where the submission to arbitration does not contain an express agreement enabling the parties to make it a rule of Court, the award is not brought within the provisions of the Act of 9 & 10 Will. 3, c. 15, by force of the Common Law Procedure Act, 1852, s. 17; nor has the Bankrupt Law Consolidation Act, 1849, s. 132, this effect.

But, in such a case, this Court will follow the course taken by the Courts of Common Law, and adopt a rule of its own in analogy to the limitations of the statute.

Therefore, where the Plaintiff had suffered the next term after the publication of the award to elapse without taking any steps to set it aside, and had afterwards unsuccessfully pleaded nul tiel agard in an action on the award:—*Held*, that, although the award could not have stood if the matter had been fresh, it was then too late for the Court to interfere. *Smith v. Whitmore*, 576

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CHARGE.

The trustee of a sum of money charged on real estate, who is also owner of the estate subject to the charge, is entitled to sell any portion of the estate discharged from the trust, provided he reserves a portion sufficient to answer the charge; and the estate so sold cannot be followed into the hands of a purchaser with notice of the trust. *Grundy v. Heathcote*, 172

CHARITY.

Where a bequest to a charity fails pro tanto, as being given out of the proceeds of pure and impure personalty, the proportion in which the bequest fails is to be ascertained

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Where a public body are intrusted by Act of Parliament with the duty of executing certain works, this Court will not, in general, receive independent evidence to show that they are not carrying on those works in the best manner. *Crossman v. The Bristol & South Wales Union Railway Co.*, 531

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Gift by the will of a testator domiciled in *England*, of a sum of £5,000, in trust for *A.* for life, remainder to his wife for life, re-

mainder among his children at 21. After the death of the testator, *A.* having acquired a *French* domicile, had a daughter by a *French* lady, whom he subsequently married in *France*, and legitimated the child according to the *French* law by a contemporaneous acknowledgment: *Held*, that the term "children" in the will must be construed according to the law of *England*, and that the daughter was not entitled to any interest in the £5,000. *Boyes v. Bedale*, 798

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1. The 19th section of the International Copyright Act (7 & 8 Vict. c. 12) applies to *British* subjects first publishing in a country with which no international convention exists. *Boucicault v. Delafield*, 597

2. There is copyright in a Catalogue unless it be a mere dry list of names.

And it is no defence to say that the pirated work is not offered for sale itself, but merely used to promote the sale of the books mentioned in it.

Where a Defendant sets up the case that his work is a fair compilation from a number of others, and not a mere copy from any one, it is of the highest importance that he should produce his original manuscript. *Hotten v. Arthur*, 603

3. It is no infringement of copyright to represent a play dramatised from a novel written by another author; but it is an infringement to print and publish a play so constructed.

Perpetual injunction granted

against the printing and publishing of such a play, without any preliminary inquiry as to damages. *Tinsley v. Lacy*, 747

COSTS.

1. On a Defendant submitting to Plaintiff's demands, the Plaintiff ought not to bring the cause to a hearing without first applying for Defendant's consent to have the costs disposed of on motion. But if the Defendant objects to that course, a motion that the Defendant may pay the costs of the suit will be refused. *Morgan v. Great Eastern Railway Company*, 78

2. In a Bill by one shareholder on behalf of himself and all others except the Defendants, to restrain the Directors from improper dealings with the Company's funds; such funds do not belong to the Plaintiff as cestui que trust thereof, so as to entitle him, in the event of success, to his costs thereout as between solicitor and client. *Morgan v. The Great Eastern Railway Company (No. 2)*, 560

See JOINT STOCK COMPANY, 1.

LANDS CLAUSES ACT, 1, 3.

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PRACTICE, 9, 10, 13.

COURT OF RECORD.

See COMMISSIONERS OF SEWERS.

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1. Where a deed contains an absolute covenant not to do an act, such covenant will not, in the absence of a Bill to rectify the deed, be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages. *Bird v. Lake*, 111

2. A covenant not to be engaged in a specified trade, "or in any matter or thing whatsoever in anywise relating thereto" within a given district, does not prevent the covenantor from lending money to a person engaged in such trade within the said limits upon mortgage of his trade premises, although he may know that the mortgagor has no means of paying the debt except out of the profits of the business.

Semble: A mortgage expressly charging the debt upon such profits would be a breach of the covenant.

Semble also: There is nothing in such a covenant to prevent the covenantor from buying any number of houses within the district, fitting them up, and selling them for the purpose of the trade in question, provided he has no direct interest in the businesses carried on in them after such sales respectively. *Bird v. Lake* (No. 2), *Bird v. Turner*, 338

3. A sub-lessee of a house, whose immediate lessor is bound by covenant not to carry on a particular trade, will be restrained from carrying on such trade, although he took his lease without notice of the covenant, at least unless it appears that he made careful inquiries at the time of taking his lease, and learnt nothing which should have set him on further investigation. *Parker v. Whyte*, 167

4. Covenant by a father in his daughter's marriage settlement not to exercise a power so as to diminish her portion under the father's settlement:—*Held*, a release pro tanto of the power.

A gross sum was directed to be raised after the decease of the settlor and his wife (tenants for life) for portions of children other than their eldest or only son, equally to be divided:—*Held*, that the personal representatives of the eldest son, who attained twenty-one, and died

in his father's lifetime, were entitled to one share.

Held also, that the personal representatives of a daughter who attained twenty-one and died unmarried in her father's lifetime, was entitled to a share.

Held also, that the second son, who during the father's life and after attaining his majority became the eldest son, and succeeded to the settled estate, and the personal representatives of a child who died in infancy, were not entitled. *Davies v. Huguenin*, 730

See FUTURE PROPERTY.
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See PLEADING, 6.

DEFENCE ACT, 1860.

Notice was given under the Defence Act, 1860, requiring certain lands to be kept free from buildings; and an agreement was entered into, fixing the amount of the compensation. After a considerable interval, the agreed sum, with £30 for expenses, as provided by the Act, but without interest, was paid into the Bank:—*Held*, on demurrer, that the owner could not claim interest, and that the payment was sufficient. *Earl of Suffolk v. Lewis*, 369

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FOREIGN DOMICIL.

See CONFLICT OF LAWS.

FOREIGN JUDGMENT.

A *British* ship was duly mortgaged in *England*, and remained in the possession of the mortgagor, who afterwards sent her to *New Orleans*. There she was attached by a citizen of *Louisiana*, a creditor of the mortgagor, in an action commenced for the recovery of his debt, not being a proceeding in rem. The mortgagee intervened in the action, and claimed possession of the ship. The Supreme Court of *Louisiana* refused to recognise his title, though good by the law of *England*, assigning as a reason, on the face of the judgment, that the law of *Louisiana* did not recognise transfers of property in chattels without delivery of possession, that to admit the claim would be prejudicial to the citizens of *Louisiana*, and that the comity of nations did not extend to the case. The ship was then sold, under a writ in the nature of a *fi. fa.* in the action, to the Defendant in this cause, and the proceeds were applied in favour of the creditors to the exclusion of the mortgagee. The ship having been brought to *England*, the mortgagee, whose debt was admitted to exceed the value of the ship, filed his Bill to establish his claim.

Held, that the judgment of the Court of *Louisiana* was examinable for error on the face of it by reason of its disregard of the comity of nations, and that the mortgagee was entitled to the ship.

Held also, that the judgment was of the nature of a judgment *inter partes* as regarded the intervenor. But

Semle, that a foreign judgment even in rem may be examined and disregarded, if it appears on the face of it to have been founded on a perverse disregard of *English* law in a case properly subject to that law by the comity of nations. *Simpson v. Fogo*,
195

FOREIGN SOVEREIGN.

A Bill filed against the *Ottoman Bank*, its directors, and the Sultan, alleged that the Sultan's Government had granted to the Plaintiffs the exclusive right of issuing bank notes in *Turkey*, and had subsequently, in derogation of that grant, made a similar concession to the Defendants, the *Ottoman Bank*, and prayed a declaration of the Plaintiffs' exclusive right, and an injunction against the *Ottoman Bank* and its directors.

Held, on the demurrer of the Bank and directors, that, inasmuch as the Court had no jurisdiction on the contract as against the Sultan, it had none against the Bank and its directors, and demurrer allowed accordingly. *Gladstone v. Ottoman Bank*, 505

See AMBASSADOR.

FRAUD.

Where shares in a Joint-Stock Company have been issued fraudulently, a bona fide purchaser of these shares in the market, before any Bill has been filed to impeach the transaction, is entitled, on a winding-up of the Company, notwithstanding the fraud and notwithstanding that he bought the shares at a very great discount, to prove on equal terms with the other shareholders of the Company who bought their shares at par: but this privilege does not extend to any person who purchased his shares after the filing of the Bill, unless his vendor was a bona fide holder of the shares before Bill filed; and the onus of proof that such was the case is upon him. *Barnard v. Bagshaw*, *In Re The Lake Bathurst Australasian Gold Mining Company*, 69

See ALTERNATIVE RELIEF.
FOREIGN SOVEREIGN.

FUND IN MEDIO.

See AMBASSADOR.

FUTURE PROPERTY (COVENANT TO SETTLE).

Covenant in marriage settlement by husband and wife to settle all property of the value of £200, which the husband and wife, or either of them in her right, should during the coverture become entitled to other than separate property or life interests of the wife:—*Held*, that property devised and bequeathed to the husband and wife as joint tenants was not within the covenant.

Semble, that property which does not vest in possession during the coverture is not within a covenant so framed. *Edye v. Addison*, 781

GAVELKIND.

In customary descent the ordinary incidents of descent attach to the custom. Therefore, in gavelkind descent, the jus representationis applies to the remoter issue as well as to the sons of the intestate's brothers.

An intestate had one brother, who died in his lifetime. The brother (besides a son who died without issue in the intestate's lifetime) had two sons; the elder, who died in the intestate's life, leaving two sons (the Defendants) and the younger (the Plaintiff), who survived the intestate:—

Held, that gavelkind lands of the intestate descended, as to one moiety, to the brother's younger son, and as to the other, to the two sons of the brother's eldest son equally. *Hook v. Hook*, 43

GUARANTEE.

Where a limited guaranty has been given, and the limit has been ex-

ceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guaranty.

Where, in such a case, the guarantee has recovered the whole sum guaranteed in an action against the guarantor, the right of the latter to file a Bill for an account and payment to him of such dividends is not barred by the fact that he might have pleaded a set-off to that extent in the action, and omitted to do so.

Such a claim is not a "mere money demand" within the meaning of the principle which excludes suits for damages merely. *Thornton v. M'Kewan*, 525

GROUND-RENTS.

See LANDS CLAUSES ACT, 1.

HEIR-AT-LAW.

See PRACTICE, 6.

HOTCHPOT OF LIFE INTERESTS.

See POWER.

HUSBAND AND WIFE.

See PRACTICE, 5, 10.

ILLEGITIMACY.

The Court will not refuse to entertain a suit for the execution of the trusts of a settlement, where the settled fund actually exists, merely on the ground that the settled fund is so small as to be of no importance to the cestui que trust, and that the settlement was really made to raise a different question (which the Court would not have directly determined), by a side wind. Nor will the Court allow

such a question to be evaded by a counter settlement.

But, *semble*, the Court would not entertain such a suit at the instance of a stranger, nor if it appeared to have been instituted with a malicious motive. *Gurney v. Gurney*, 413

ILLUSORY TRUST.

See ILLEGITIMACY.

INFANT TRUSTEE.

See TRUST AND TRUSTEE, 1.

INHERITANCE ACT.

A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption, until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase. *Dorling v. Clayton*, 402

INJUNCTION.

See COPYRIGHT, 3.

PRACTICE, 7.

RAILWAY COMPANY, 1, 2.

SPECIFIC PERFORMANCE, 1.

TRADE MARK, 3, 5.

INJUNCTION—FORM OF ORDER.

See LIGHTS, 1.

INSOLVENT COMPANY.

See WINDING-UP ACTS.

INSURANCE.

1. In order to entitle an owner to the benefit of the 83rd section of the 14 Geo. 3, c. 78, he must make a distinct request to the insurance office to apply the policy money in rebuilding before they

have settled with the tenant insuring; and in no case is the owner entitled to rebuild himself and claim the policy money under the said section.

Quære, whether the 83rd section is general or confined to houses within the Bills of Mortality.

Where a policy makes the assets of a company liable, excluding personal liability, *Semble*, that this does not give jurisdiction to a Court of Equity to interfere in the first instance to enforce the 83rd section of the said statute, and that the proper course is first to apply for a mandamus. *Simpson v. Scottish Union Insurance Company*, 618

2. Where a policy of assurance contains the usual condition, that it shall be void in case the assured die by his own hand, "except to the extent of any interest acquired therein by actual assignment for valuable consideration," and the assured mortgages the policy along with other property for a sum much less than the total value of the mortgaged property, but exceeding the amount secured by the policy, and afterwards dies by his own hand, not feloniously, the Company have no equity against either the property comprised in the mortgage or the estate of the assured.

The principle of marshalling securities does not apply to such a case; and the assured and the Company do not stand in the relative position of principal and surety.

Semble:—that if the mortgagor's representative had redeemed the mortgage aliunde, he would be entitled to recover on the policy for the benefit of the mortgagor's estate. *The Solicitors' and General Life Assurance Society (Registered) v. Lamb*, 716

INTEREST.

See DEFENCE ACT, 1860.

INTERIM INCOME.

See WILL, 1, 3.

INTERNATIONAL COPY-RIGHT.

See COPYRIGHT, 1.

ISSUE.

See PRACTICE, 6.

JOINT STOCK COMPANY.

1. Where the Directors of a Joint Stock Company carry on a business not authorised by the deed of settlement, and costs are thereby incurred, the solicitors of the Company have no lien for their costs on the papers of the Company.

Where, in such a case, moneys have been recovered in any of the actions, although the solicitors would have had a lien for their costs on such moneys while in their hands, yet after they have paid over such moneys to the Company, and allowed them to be incorporated with the general assets, they have no lien on those assets in respect of such costs.

Where, in such a case, moneys have been paid by the Company to the solicitors on account of costs generally, the solicitors have no right post litem motam to appropriate such payments to the costs incurred in respect of the unauthorised business, but, on the contrary, the Court will appropriate the payments to the costs which the Company was liable to pay. *Re Phoenix Life Assurance Company, Howard and Dollman's Case*, 433

2. A Life and Fire Assurance Company purchased the business

and undertook the liabilities of a Life Assurance Company, the purchase being confirmed by special general meetings of both Companies, and subsequently acted upon.

The deed of the purchasing Company empowered a general meeting to authorise any act requiring the sanction of such meeting, and to determine on any question relating to the affairs of the Company which should arise in the course of the conduct or management thereof. It also empowered the directors, where the deed was silent, to act in the direction of the concerns of the Company, as at their absolute discretion they should think most conducive to the interests of the Company. The purchase having been to a great extent carried out:—

Held, under the circumstances, following "*Era Case*" (1 D. G. J. & S. 29), that the creditors of the selling Company, who had been thus adopted as creditors of the purchasing Company, were entitled to prove against the latter, which was in course of winding up. But, *semble*, that the purchase was not originally within the powers of the directors; and *quære* what is sufficient to constitute acquiescence on the part of shareholders. *Re Era Assurance Company, Williams' Case*, —*Anchor Case*, 672

3. A policy-holder, by whose policy the funds of a Company were made liable to pay the sum insured and certain shares of profit by way of bonus—*Held*, entitled to an injunction to restrain the Company from transferring its business and assets to another Company contrary to the provisions of the deed of settlement, and without making provision out of its own assets for payment of the Plaintiff's policy. *Kearns v. Leaf—Aldebert v. Kearns*, 681

See APPORTIONMENT, 1.
FRAUD, 1.
WILL, 5.
WINDING-UP ACTS.

JURISDICTION.

See AMBASSADOR.
COMMISSIONERS OF SEWERS.
FOREIGN SOVEREIGN.
PRACTICE, 7, 12.
INSURANCE.
SPECIFIC PERFORMANCE, 1.
THAMES CONSERVANCY ACT.

JUS REPRESENTATIONIS.

See GAVELKIND.

LANDS CLAUSES ACT.

1. Where there is a bargain between the ground landlord of houses let at a gross ground-rent, and a Railway Company who have taken some of the houses, for the payment of compensation at so many years purchase on the rents of the houses taken, the costs of apportioning the ground-rents between the houses taken and those left are not payable by the Company under the Lands Clauses Consolidation Act, 1845, s. 82.

Semble, they would have been so payable had the matter come under s. 80. *In Re Hampstead Junction Railway, Ex parte Buck*, 519

2. A written agreement void at law, but equivalent in equity to a lease, is an interest greater than a yearly tenancy, within the meaning of the Lands Clauses Consolidation Act; and a tenant having and producing such an agreement is not liable to have the value of his interest assessed by two justices under the 121st section of the Act. *Sweetman v. Metropolitan Railway Company*, 543

3. A Railway Company served a notice to treat, and gave the usual bond, and made the deposit required by the 85th section. The landowner filed a Bill to restrain the Company from entering, but a motion for injunction stood over by arrangement, and no further steps were taken. Ultimately, the Company abandoned the purchase with the concurrence of the owner:—*Held*, on a petition for a re-transfer of the deposit to the Company, and for the cancelling of the bond, that the owner was not entitled to have the costs of the suit out of the deposit. But, *semble*, he would have been so entitled if the purchase had been abandoned by reason of the inability of the Company to complete. *Ex parte Birmingham, Wolverhampton, and Dudley Railway Company*, 772

See PRACTICE, 4.

LAW AND EQUITY (SAME DEFENCE).

See AWARD.

GUARANTEE.

LEASE.

See COVENANT, 3.

LANDS CLAUSES ACT, 2.

LEGITIMACY.

See CONFLICT OF LAWS.

LEX LOCI.

See FOREIGN JUDGMENT.

LIEN.

See JOINT-STOCK COMPANY, 1.

LIGHTS.

Plaintiff filed a Bill to restrain obstruction to lights alleged to be

ancient. Defendant denied that they were ancient lights. On a jury trial, some were found to be ancient and the rest to be new or altered in position within twenty years. On Plaintiff submitting to an order to block up the new and restore the altered windows to their old position, an injunction was granted; but the costs of the suit, other than those of the issues, were ordered to be paid by the Plaintiff. *Weatherley v. Ross*, 349

LLOYD'S BONDS.

See PLEADING, 5.

LUNACY REGULATION ACT.

A testator devised his personalty and an estate *K.* and other real estates upon trusts for payment of debts, and subject thereto to certain devisees, and afterwards purchased the *H.* estate, as to which he died intestate. The testator deposited the deeds of the *H.* estate to secure £1,000, and was subsequently found lunatic. Under an order in lunacy a mortgage was made of the *H.* and *K.* estates, to raise a sum of money to pay off the £1,000 and other debts of the lunatic; and a proviso was inserted, that as between the lunatic, his heirs, and devisees, the *H.* estate should be considered as the primary security for the mortgage debt. The lunatic having died:—*Held*, that, on the true construction of the proviso, it did not have the effect of exonerating the devised estates at the expense of the *H.* estate, and the devised estates ordered to be first applied in payment of the mortgage debt. *Quere*—Whether a proviso having such an effect would have been within the jurisdiction of the Lords Justices. *Free-man v. Ellis*, 758

METROPOLIS LOCAL MANAGEMENT ACT.

The right of prosecution given to the Home Secretary by the Act 21 & 22 Vict. c. 104, s. 31, does not supersede the right of private persons aggrieved by the nuisance to an injunction.

Distinction between parliamentary powers to do acts which necessarily involve the commission of nuisances, and powers which may possibly be exercised without giving rise to nuisances. *Attorney-General at the relation of The Trustees of the River Lee v. The Metropolitan Board of Works*, 298

MONEY DEMAND.

See GUARANTEE.

MORTGAGOR AND MORTGAGEE.

When moneys, which form part of a larger sum placed by his client in the hands of a solicitor for purposes of investment, are lent by him on the security of a mortgage in which he has affected to act as principal, the client is bound by notice of all the circumstances which come within his (the solicitor's) knowledge.

Where in such a case the mortgage debt is afterwards settled upon trusts which are substantially trusts for the benefit of the original mortgagee, the trustees have no higher rights than their cestui que trust had before the settlement.

Where a mortgage professes to be made in consideration of a sum down, and which is by the deed made immediately payable, whereas the contract was for an annuity, and the consideration was not to be payable till after the death of a person named, such mortgage is fraudulent and void as against a mortgagor who joined therein as

surety only. *Spaight v. Cowne—Edwards v. Spaight*, 359

See CHARGE, 1.

INSURANCE, 2.

LUNACY REGULATION ACT.
PRACTICE, 5.

MORTMAIN.

See CHARITY, 1.

MOTION.

See COSTS, 1.

MULTIFARIOUSNESS.

See PLEADING, 1, 2.

NON-ACCESS OF HUSBAND.

See ILLEGITIMACY.

NOTICE.

See CHARGE.

MORTGAGOR AND MORTGAGEE.

NOTICE TO QUIT.

See DEFENCE ACT, 1860.

NOVEL.

See COPYRIGHT, 3.

NUISANCE.

See METROPOLITAN LOCAL MANAGEMENT ACT.

PRACTICE, 7.

THAMES CONSERVANCY ACT.

OBSTRUCTION.

See LIGHTS.

ONUS OF PROOF.

See TRUST AND TRUSTEE, 3.

ORDERS CONSOLIDATED X.

RULE 7.

See PRACTICE, 12.

PARTIES.

See PLEADING, 2.

PRACTICE, 5, 13.

PARTNERSHIP.

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract; and although after notice of the retirement the retiring partner is in a sense a surety (on the principle of *Oakeley v. Paskeller*) that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract.

Continuing partners under such a contract (which inter alia gave the firm the power of appointing an arbitrator in case of dispute) entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract:—*Held*, that this was not such a variation of the original contract as to discharge the retired partner. *Oakford v. European & American Steam Shipping Company (Limited)*, 182

See WINDING-UP ACTS, 2.

PATENT.

See PRACTICE 2.

PAYMENT OUT OF COURT.

See PRACTICE, 4.

PLEADING.

1. There is no equity to maintain a Bill against the representatives of a person who was accessory to a fraud, from which he derived no pecuniary benefit, merely on the ground, that, if alive, he might have been made answerable for costs.

The relation between managers of a Company and the shareholders in respect of shares in the Company is not analogous to the relation of trustee and cestui que trust in respect of the trust property.

Therefore, one such manager who assists another to deal fraudulently with the shares is not answerable, as a trustee would be who knowingly permits his co-trustee to make default. *Walsham v. Stainton*, 322

2. Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase-money, is a proper party to a suit by the purchaser to have the right to the purchase-money ascertained, and for specific performance against the vendor. *West Midland Railway Company v. Nixon*, 176

3. The rule, that a Defendant who elects to answer must answer fully, though subject to certain specified exceptions, applies to a case where the defence consists of a pleadable point not pleaded, and where the discovery, assuming the case made by the Bill and denied by the Answer to be substantiated, would or might be material to the relief to be obtained at the Hearing. *Swabey v. Sutton*, 514

4. Where the Bill prays alternative relief, and the Plaintiff would

only be entitled to the discovery asked for under one of the alternatives, which is not the one principally relied on by the Bill, and the information desired could not be material for the purpose of determining to which of such alternatives the Plaintiff is entitled, such discovery will not be compelled before the Hearing. *Lett v. Parry*, 517

5. A Railway Company, after exhausting their Parliamentary borrowing powers, issued bonds in the form known as *Lloyd's Bonds*, viz. an acknowledgment of debt and a covenant to pay, with interest, on a future day—partly to a contractor and partly to persons who supplied a Parliamentary deposit. At the time of the issue the Company was promoting or contemplating a bill, which was ultimately passed, to enable them to raise further share and loan capital:—*Held*, on demurrer, that these allegations would not justify the Court in declaring the bonds illegal.

Semble, that a Company intending to issue such bonds to raise a Parliamentary deposit would be restrained before the money was raised; though, after the money had been raised and applied, the Court would not interfere.

Whether such bonds would be valid if issued for the purpose of evading the limitations of a Company's borrowing powers—*Quære*.

A suit by a shareholder to restrain an illegal act must be in form on behalf of all the shareholders, though it may be sustained notwithstanding their opposition. *White v. Carmarthen, &c., Railway Company*, 786

6. Where a Defendant holds a covenant for the production of deeds for the maintenance and manifestation of his title, he is not bound, in answer to interrogatories, to set out such deeds in a suit, the

object of which is to show that a disputed piece of land is not comprised in the Defendant's title.

Semble, also, that it would be a fraud on the covenant for the covenantor to claim the production of the deeds, and then use them for any such purpose.

Semble, also, that a Defendant is not bound to incur costs in obtaining production of deeds for the purpose of giving discovery to the Plaintiff. *Bethell v. Casson*, 806

See COMMISSIONERS OF SEWERS. GUARANTEE.

POLICY OF ASSURANCE.

See INSURANCE, 2.

PORTIONS.

See COVENANT, 4.

POWER.

Under an exclusive power to appoint a trust fund of stock to children and their issue born during the lives of the donees of the power, with a hotchpot clause, an appointment was made to five daughters out of nine children, whereby the trustees were directed, after the death of the parents (tenants for life) to stand possessed of the fund upon the trusts following: that is to say, upon trust thereout to appropriate one-fifth part to and for the benefit of each daughter, and to pay and apply the income of the share of each daughter for her separate use; and after the decease of each daughter, upon trusts for the benefit of her children:—*Held*, that the limitations over being void, the daughters took life interests only, subject to account for the value under the hotchpot clause. *Rucker v. Scholefield*, 36

See COVENANT, 4.

PRACTICE.

1. Evidence of belief only is admissible on interlocutory application, though not at the hearing of a cause, and the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be but are not produced, and where the deponent swears that he disbelieves the statements made to him by such persons.

The rule, that no new evidence can be adduced on a motion after it has been opened, extends to the case of documents which it is proposed to verify *viva voce* by the attesting witness. *Bird v. Lake*, 111

2. Particulars of breaches delivered with a view to a jury trial of a patent case in this Court are sufficient, if taken together with the pleadings, they give the Defendant full and fair notice of the case to be made against him. *Needham v. Oxley*, 248

3. Where a suit is brought on by motion for decree, and issue is joined in a cross suit, and an order is obtained by the Plaintiff in the original suit for him to use in the cross suit affidavits filed in his own suit, it is at the option of the Plaintiff in the cross suit either to treat these affidavits as filed in the original suit, and so cross-examine the witnesses before an examiner, or to consider them as evidence to be used in his own suit, and give notice of cross-examination in open Court at the Hearing. *Neve v. Pennell, Hunt v. Neve*, 252

4. A fund which represented the interest of a tenant in tail in remainder in land taken by a railway company ordered to be paid out of Court to the tenant in tail in remainder with the consent of the tenant for life, without requiring a disentailing deed. *In re Holden, In*

re The London and North Western Railway Co., 445

5. A Bill to redeem a mortgage on the real estate of a married woman should not be filed by husband and wife merely, but by the wife by her next friend, making her husband a co-Plaintiff. And this is the right course even where the husband is a bankrupt. *Smith v. Etches*, 558

6. On a Bill by an heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the Court is bound, under Mr. *Roll's* Act, to determine the question, without remitting the parties to an action at law. But, by analogy to the old practice, the Court will in general, in such cases, direct a trial by jury, and (with a view to the contingency of a motion for a new trial) will direct the trial to be before itself. *Egmont v. Darell*, 563

7. A Bill to restrain a nuisance is within the provisions of Mr. *Roll's* Act (25 & 26 Vict. c. 42); and the Court has no longer the power to require the Plaintiff to establish his right at law.

But this does not affect the Defendant's right to have the question of nuisance or no nuisance decided by a jury.

Principle upon which the Court acts in determining whether or no to grant injunctions in such cases.

Semble, this Court will not, ordinarily, try a question of nuisance before itself, unless the acts complained of have been done in London or *Middlesex*, but will direct an issue. *Eaden v. Firth*, 573

8. Where, after an unsuccessful sale by auction, the Chief Clerk arranged, that, in lieu of a second auction, sealed tenders might be sent in:—*Held*, that this was a sale within the rules as to opening biddings, and the biddings opened accordingly on

the offer of a large advance. *Waterhouse v. Wilkinson*, 636

9. Where, by an error in the instructions to counsel, a party has been caused unintentionally to make an admission contrary to the fact, the Court allowed the Defendants to file a supplemental answer, on payment of costs. *Cooper v. Uttoxeter Burial Board*, 680

10. The rule that the next friend of a married woman must either be a person of substance, or give security for costs, applies to a case where the husband of the married woman (not having any substantial interest) is a co-Plaintiff. And the rule, that, when you have one co-Plaintiff personally liable to costs, you have no right to security as against any other co-Plaintiff, does not apply to such a case. *Smith v. Etches (No.2)*, 711

11. When one of two co-Plaintiffs refuses to concur in the appointment of a solicitor, there being no solicitor on the record, the proper course is for the remaining Plaintiff to apply in chambers for the sole conduct of the cause on a summons taken out in person against the refusing Plaintiff only, and a motion to strike out the name of the refusing party as Plaintiff and make him a Defendant will be refused. *Bullin v. Arnold*, 715

12. The Orders of 1845 (Consolidated Order X, rule 7), as to service on Defendants out of the jurisdiction, are not limited by the statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, but have validity by force of the 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, and of the course of practice founded upon them. Under these Orders the Court has discretion to refuse to order service abroad, and will do so, not only when, as in *Cookney v. Anderson*, the whole subject matter is beyond the jurisdiction, but also when there are no

means of effectually reaching the parties to the suit. *Steele v. Stuart*, 793

13. On an Information and Bill to establish a charity rent-charge against certain lands, the owners of which had paid the whole of the charge from 1818 to 1853, the Defendants, by their answer, stated that the owners of other lands, some of whom they pointed out, who were not parties to the said suit, were jointly liable:—*Held*, that this was no bar to a decree, and that the costs of an inquiry on the subject must be borne by the Defendants. *Attorney-General v. Naylor*, 809

See ACCOUNT, 1.

AWARD.

COSTS, 1, 2.

PLEADING, 3, 5.

TRADE MARK, 4.

WINDING-UP ACTS, 4, 5.

PRINCIPAL AND AGENT.

See ACCOUNT, 1.

PRINCIPAL AND SURETY.

See MORTGAGOR AND MORTGAGEE.
PARTNERSHIP.

PRIZE MEDAL.

See TRADE MARK, 2.

PRODUCTION OF DOCUMENTS.

See PLEADING, 6.

PROMISSORY NOTE.

See TRUST AND TRUSTEE, 3.

PROOF IN BANKRUPTCY.

See WINDING-UP ACTS, 6.

PROOF OF VALUE OF ANNUITY.

See WINDING-UP ACTS.

PUBLIC AND PRIVATE RIGHTS.

See THAMES CONSERVANCY ACT.

PUBLIC POLICY.

See COVENANT, 2.

PURCHASER WITH NOTICE.

See CHARGE.

PURCHASE OR DESCENT.

See INHERITANCE ACT.

RAILWAY COMPANY.

1. Where an agreement made between two Railway Companies under their common seals contains clauses which are beyond the powers of the directors of one of the Companies, and clauses for referring to arbitration all disputes arising under the agreement, this Court will, at the suit of a shareholder of that Company, restrain both Companies from proceeding to arbitration in respect of alleged breaches of those clauses.

But no such injunction will be granted at the suit of a shareholder of the other Company, on the ground that the stipulations of any such clause are beyond the powers of the directors of the Company in which the Plaintiff is not a shareholder.

An agreement by a Railway Company to contribute towards the parliamentary deposit required for bills promoted by another Company is ultra vires.

So also is an agreement to take shares in future extensions of another Company.

So also an agreement to make traffic regulations applicable to future extensions.

But no such agreement is ultra vires if its validity is expressly made to depend on the sanction of Parliament. *Maunsell v. Midland Great*

Western (Ireland) Railway Company, 130

2. Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers; still, where it appears that the Plaintiff is merely a puppet in the hands of others, not shareholders in the Company, who indemnify him against the costs of the suit, the Court will not interfere by interlocutory injunction. *Filder v. London, Brighton, and South Coast Railway Company,* 439

See COSTS, 2.

LANDS CLAUSES ACT, 1, 2, 3.

PLEADING, 5.

PRACTICE, 4.

SPECIFIC PERFORMANCE, 1.

RECITAL.

See COVENANT, 1.

REDEMPTION OF MORTGAGE.

See PRACTICE, 5.

RELEASE OF POWER.

See COVENANT, 4.

REMOTENESS.

See POWER.

WILL, 2.

RESIDUARY BEQUEST.

See WILL, 4.

RETIRING PARTNER.

See PARTNERSHIP.

REVOKED GIFT.

See WILL, 4.

ROLT'S ACT.

See PRACTICE, 6, 7.

SALE.

See PRACTICE, 8.

SALE, TRUST FOR.

See TRUST AND TRUSTEE, 1.

SECURITY FOR COSTS.

See PRACTICE, 10.

SERVICE OUT OF JURISDICTION.

See PRACTICE, 12.

SET OFF.

See GUARANTEE.

SETTLEMENT.

See COVENANT, 2.
FUTURE PROPERTY.

SHARES, FRAUDULENT ISSUE OF.

See FRAUD, 1.

SHAREHOLDER'S BILL.

See COSTS, 2.

SOLICITOR.

See PRACTICE, 11.

SOLICITOR AND CLIENT.

See JOINT STOCK COMPANY, 1.
MORTGAGOR AND MORTGAGEE.

SPECIFIC LEGACY.

See WILL, 7.

SPECIFIC PERFORMANCE.

1. This Court has not jurisdiction to decree the specific performance

of a contract, for which the consideration on the part of the Plaintiff is the execution of certain works which the Court is unable to superintend.

Therefore, where the Bill stated an agreement to employ the Plaintiffs as contractors for making a railway, and to pay for the works in debentures and shares of the Company, a motion for an injunction to restrain the Company from dealing with the debentures, and transferring the shares in question to others in derogation of the Plaintiff's rights was refused. *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company,* 468

See ALTERNATIVE RELIEF.
PLEADING, 2.

STATUTES.

23 HEN. 8, c. 5.

See COMMISSIONERS OF SEWERS.

9 & 10 WILL. 3, c. 15.

See AWARD.

14 GEO. 3, c. 78.

See INSURANCE.

3 & 4 WILL. 4, c. 22.

See COMMISSIONERS OF SEWERS.

3 & 4 WILL. 4, c. 106.

See INHERITANCE ACT.

4 & 5 WILL. 4, c. 22.

See APPORTIONMENT, 1.

4 & 5 WILL. 4, c. 82.

See PRACTICE, 12,

STATUTES.

1 VICT. c. 26.

See WILL, 9.

2 & 3 VICT. c. 33.

See PRACTICE, 12.

4 & 5 VICT. c. 52.

See PRACTICE, 12.

7 & 8 VICT. c. 12.

See COPYRIGHT, 1.

8 VICT. c. 16.

See APPORTIONMENT 1.

8 & 9 VICT. c. 18.

*See LANDS CLAUSES ACT.
PRACTICE, 4.*

11 & 12 VICT. c. 45.

12 & 13 VICT. cc. 106, 108.

See WINDING-UP ACTS, 1, 2, 6.

16 & 17 VICT. c. 70.

See LUNACY REGULATION ACT.

18 & 19 VICT. c. 120.

*See METROPOLIS LOCAL MANAGE-
MENT ACT.*

20 & 21 VICT. c. 78.

See WINDING-UP ACTS, 1, 2.

20 & 21 VICT. c. 147.

See THAMES CONSERVANCY ACT.

21 & 22 VICT. c. 93.

See ILLEGITIMACY.

21 & 22 VICT. c. 104.

*See METROPOLIS LOCAL MANAGE-
MENT ACT.*

THAMES CONSERVANCY ACT. 831

23 & 24 VICT. c. 112.

See DEFENCE ACT, 1860.

24 & 25 VICT. c. 184.

See WINDING-UP ACTS, 6.

25 & 26 VICT. c. 42.

See PRACTICE, 6, 7.

25 & 26 VICT. c. 89.

See WINDING-UP ACTS, 1, 2.

SUICIDE.

See INSURANCE, 2.

SURETY.

*See MORTGAGOR & MORTGAGEE.
PARTNERSHIP.*

SUSPENSE OF LIMITATIONS.

See WILL, 1.

TENANCY BY ENTIRETIES.

See FUTURE PROPERTY.

TENANCY IN COMMON.

See WILL, 6.

TENANTS FOR LIFE IM- PEACHABLE FOR WASTE.

See WILL, 8.

THAMES CONSERVANCY ACT.

Under the *Thames Conservancy Act, 1857*, the Conservators were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty.

Held, that the Court had no juria-

diction to interfere by injunction at the suit of the Attorney-General, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere in a case where it was shown that the piers would be entirely useless.

The statute directed, that, whenever the Conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Watermen's Company, they should erect equally convenient stairs or landing-places in substitution for them.

Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance; and that where the Conservators had prepared plans for piers which would interfere with such old stairs, without showing any adequate provision in substitution for them, the Court would not assume that the duty would be neglected, and would not interfere at the suit of the Attorney-General to restrain the works until proper substitutes should be provided for the old stairs. *Attorney-General v. Conservators of the Thames.* 1

TRADE, COVENANT AGAINST.

See COVENANT, 2, 3.

TRADE MARK.

1. It is not necessary, in order to give a right to an injunction, that a specific trade mark should be infringed; it is sufficient that the Court should be satisfied that there was, on the whole, a fraudulent intention of palming off the Defendant's goods as those of the Plaintiff. But, in such a case, it is essential that the imitation should be necessarily calculated to deceive; and where it did not appear that any one had been, in fact, deceived, and a

material part of the Plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere. *Woollam v. Ratcliff*, 259

2. This Court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the Plaintiff.

The persons to whom prize medals have been awarded by the Commissioners of the International Exhibition, have not ipso facto any special property in the nature of a trade mark in the words "prize medal."

Therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "Prize Medal, 1862," this Court refused to interfere at the instance of a person who had obtained such a medal. *Batty v. Hill*, 264

3. Although a trade mark is not "property" properly so called, yet when a business is bona fide assigned, the exclusive right to use a trade mark which has been appropriated to that business may be assigned along with it. And this principle applies even where the right to use the same trade mark (out of *England*) is retained by the assignors.

Where a trade mark has once been legitimately acquired, an altered state of circumstances rendering the specific assertions appearing on the face of the trade mark no longer true, will not render the use of such mark improper.

Although a statement in his trade mark, which is false ab initio, will in general deprive the Plaintiff of all right to relief, this principle does not apply to a case where the falsehood in question was not reasonably calculated to deceive. *The Leather Cloth Company (Limited) v. The*

American Leather Cloth Company (Limited), 271

4. Where a decree has been made directing the Defendant to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required, on cross-examination, to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped. *The Leather Cloth Company (Limited) v. Hirschfeld*, 295

5. Where *A.* introduces into the market an article, which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, *B.* will not be permitted to sell a similar article under the same name; and this, although the peculiarity of the name in question has long been in common use as applied to goods of a different kind. And it will make no difference that the Plaintiff has also a trade mark which has not been taken by the Defendant. *Braham v. Bustard*, 447

TRUST AND TRUSTEE.

1. Although a power simply collateral may be exercised by an infant, a devise to an infant and others upon a discretionary trust for sale cannot be exercised by them.

Devises on a discretionary trust for sale (one of whom was an infant) having contracted to sell: *held*, on a Bill by the purchaser for specific performance, that the contract was void, and Bill dismissed accordingly. *King v. Bellord*, 343

2. A testator directed his executors to distribute between his wife

and sons (of whom there were six) such portions of his plate, &c., as they should judge expedient, and to sell the rest. The will carried the proceeds of such sale to three of the sons to whom the residue was left in equal shares. The only executor who proved was one of the sons, who distributed portions of the plate, &c., unequally, taking the largest share himself. The distribution, however, was made in accordance with a letter written by the testator, and with the consent of the adults interested, and of one of the guardians of the infants, and the bona fides of the distribution was not questioned. *Held*, that the distribution was authorised by the will. *Davis v. Davis*, 255

3. Notwithstanding the general rule, that the onus is on the maker of a negotiable instrument to show that it has been paid, the holder is bound, in the first place (unless he be a derivative indorsee for value during the currency of the bill or note) to show that the maker received value for it.

When a bank, with knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in their favour by *A.* (a person just come of age), unreservedly in the power of *B.* (a person who stands in loco parentis to *A.*), knowing at the time that *B.* claims to be a creditor of *A.* to a large amount for necessities supplied, and *B.* afterwards misappropriates the money, the bank will be restrained from suing on the note. *Dettmar v. Metropolitan and Provincial Bank (Limited)*, 641

See CHARGE.

ILLEGITIMACY.

MORTGAGOR AND MORTGAGEE.

ULTRA VIRES.

See JOINT STOCK COMPANY, 1, 2, 3.

PLEADING, 5.

RAILWAY COMPANY, 1, 2.

UNDERLEASE.

See COVENANT, 8.

VENDOR AND PURCHASER.

See INHERITANCE ACT.
PLEADING, 2.

VESTING.

See WILL, 2, 3.

WASTE.

See WILL, 8.

WHARNCLIFFE ORDER.

See RAILWAY COMPANY, 1.

WILL.

1. Devise of *K.* and *M.* estates to *A.* for life, remainder to trustees in trust for *B.* for life, with limitations over for *B.*'s younger sons and their male issue, remainder to *B.*'s eldest son *K.* for life, remainder to his sons in tail male, with remainders over. Directions for maintenance and accumulation of rents during the minority of any tenant for life or in tail by purchase.

Gift of the residue of the real estates and all chattels real to the same trustees upon the limitations of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*

Bequest of the residuary personal estate to the same trustees, upon trust, until conversion, to invest and apply the income on the trusts after declared of the rents of the real estate to be purchased, and upon trust, at the discretion of the trustees, to invest two-thirds of the personal residue in the purchase of land, to be settled on the trusts of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*, and to invest the remaining third thereof in land to be settled to the use of *K.* for life, remainder to his sons succes-

sively in tail male, remainder on the trusts declared of the *K.* and *M.* estates subsequent to the life interests of *A.* and *B.*, with provisions for maintenance and accumulation during the minority of any tenant for life or tenant in tail in possession. Appointment of the said trustees executors of the will.

A. being dead, and *B.* being alive:—*Held*, that the rents of the residuary real estate, until the same should vest in some person entitled in possession under the will, went to the heir at law.

Held also, that the disposition of the chattels real, and of the residuary personal estate, carried with it the interim income during the suspense of vesting. *Hodgson v. Earl of Bective*, 376

2. Bequest of residue upon trust to apply such part as the trustees should think fit for maintenance of *A.* until twenty-one, then to pay her out of income £500 a-year until twenty-five, and then for *A.* for life, and after her death for all her children until they should respectively attain twenty-five, then for such children so attaining twenty-five; with a gift over. Similar bequest of leaseholds, except that it concluded with an absolute life interest in *A.*

Held, that the children of *A.* took vested interests at birth, and that the gift over was void for remoteness. *Hardcastle v. Hardcastle*, 405

3. Where a fund is severed immediately from a testator's death for the benefit of the objects of the gift, the interests are vested and carry the interim income, though the only gift is in a direction to pay at a future time.

Therefore, where, under a power of appointment over a fund, a testatrix directed the trustees, immediately after her death, to raise £5,000, and to pay the same equally

between five nephews and nieces, the shares of sons to be payable on their respectively attaining twenty-one, and of daughters at twenty-one or marriage respectively, with benefit of survivorship, and upon trust to apply the residue for the benefit of certain other persons:—

Held, that the interests vested immediately on the death of the testatrix, and that the nephews and nieces were entitled to the interim income arising from their respective shares. *Dundas v. Wolfe Murray*, 425

4. Where by the will the residue is given in shares, and by a codicil the gift of one of those shares is directed on a certain contingency to sink into the residue, "and be held and applied accordingly," the heir and next of kin of the testator will, upon the happening of the contingency, be respectively entitled to the said share, to the exclusion of the residuary legatees. *Lightfoot v. Burstall*, 546

5. The rule that a specific legatee of shares liable to calls must take them cum onere, does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate (including the shares), as an entire fund.

The true test is, whether the shares have or not been separated from the general residue at the date of the call. *Re Box*, 552

6. Devise to *A.* and her daughter *B.* for their lives, remainder to all the children of *A.* and *B.* to be begotten, as tenants in common in tail.

B. being the only daughter of *A.*—*Held* that *B.* was entitled in common with her own children to share in the remainder in tail.

Early v. Benbow (2 Col. 342) distinguished. *Almack v. Horn*, 630

7. Gift by will of annuities followed by a declaration that they should be paid by the trustees out of the rents of real estate thereby devised. Gift of all real and residuary personal estate on trust, out of the rents of the realty, to pay the annuities, and subject thereto to apply the real and residuary personal estate on certain trusts:—*Held*, that the bequest of the annuities was demonstrative; and that, the rents having proved insufficient, the annuities were payable out of the residuary personal estate. *Paget v. Huish*, 663

8. Where a testator has devised his estate to *A.* in fee, with a direction that it should be settled to the use of *A.* for life, remainder to his sons successively in tail general, or otherwise in tail as *A.* should direct, remainder to the daughters successively in tail general, remainders over; and that the settlement should contain "all usual and proper provisions" for giving effect to this intention, and all such other powers and provisions as counsel should advise—a limitation of the life estate "without impeachment of waste" is not authorised by the will. *Davenport v. Davenport*, 775

9. Testatrix devised all property, except that subject to the trusts of a specified settlement and not disposed of under the power therein contained. Subsequently she purchased other property, and settled it in substance on the same trusts:—*Held* that the after-purchased property was not within the exception, but passed by the will.

Whether the 26th section of the Wills Act applies to excepting clauses—*Quære*. *Hughes v. Jones*, 765

See CONFLICT OF LAWS.

PRACTICE, 6.

TRUST AND TRUSTEE, 2.

WINDING UP ACTS.

1. Under a winding up, subsequent to the Winding-up Amendment Act of 1857, and prior to the Joint Stock Companies Act, 1862—*Held*, that, on the Company being found to be insolvent, an annuitant was entitled to prove under the winding up for the estimated value of the annuity, without taking any preliminary proceedings to establish the amount as a debt. *Re English and Irish Church and University Assurance Society*, (No. 1), 79

2. The law of partnership is a branch of the law of agency, and the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency, and a ground for inferring it in certain cases.

An Assurance Society granted policies both in the participating and non-participating form. The former class stipulated that the funds and property of the Society should, subject to the deed of settlement, be liable to pay the sum assured, with such further sum as should, pursuant to the rules of the Society, be appropriated by way of bonus or addition, with a proviso declaring that the funds of the Society should alone be liable, and negating personal liability. The latter class stipulated that the funds and property of the Society should, subject to the deed, be liable to pay the sum assured, with a proviso that the funds of the Society, by the deed applicable to the payment of policies, should alone, subject to prior claims thereon, pursuant to the deed, be liable, and negating personal liability.

The deed provided that the actuary should estimate the amount of profits,

that this estimate might be rejected or reduced by a meeting of shareholders, and that six-tenths of the divisible profits so ascertained should be apportioned by the actuary, as he thought fair, among the participating policy-holders:—*Held*, that such policy-holders were not partners.

Held also, that claimants under both classes of policies were entitled to be paid out of the assets (the Company being in course of winding up) *pari passu* with general creditors, as to whom the liability of the shareholders was unlimited.

The assets in hand being insufficient to provide for all claims, *held*, that the general creditors were entitled, in the first instance, to be paid *pari passu* with the policy-holders, notwithstanding the possibility of their recovering further sums from individual shareholders; and that the question of marshalling did not at that stage arise. *Re English and Irish Church and University Assurance Society*, (No. 2), 85

8. A Fire Insurance Company issued policies, by which the assets of the Company were made liable to pay the amount of loss, with a limitation of the personal liability of shareholders. In other policies the form was, that the assets remaining at the time of the claim undisposed of in pursuance of the deed of settlement should be liable. The Company had also incurred general debts without any limitation of liability. The Company being in course of winding-up:—

Held, that the claimants under policies had a charge in such a sense as to entitle them to a receiver, but not so as to confer any priority as between themselves, or as against the general creditors; and that the assets in the hands of the Official Manager were distributable *pari passu* among all the creditors of the Company, in-

cluding policy-holders, without prejudice to any question as to marshalling.

Re Athenaeum, Johns. 633, qualified. *Re State Fire Insurance Company,* 457

4. Where a petition for winding up a limited Company cannot be heard on the day appointed by advertisement, by reason of the advertisement not having been inserted in proper time, the practice is to let the Petition stand over for a fortnight, with liberty to insert fresh advertisements. The practice of the Court of Bankruptcy in this respect not followed. *In re London and Westminster Wine Company,* 561

5. The provisions of the Companies

Act, 1862, as to winding up orders under the Court of Chancery, are not intended to apply to cases where there is a very small body of shareholders, and no difficulties in the way of voluntary winding up exist. *Re Natal &c. Company (Limited),* 639

6. An order under the Winding-up Acts is necessary to justify the Official Manager in proving under a bankruptcy; but proof having been made without such order against a bankrupt who had been committed for non-payment of a call—*Held* that the bankrupt was entitled to his discharge. *Re Life Assurance Treasury, Ex parte Pepper,* 755

Ses JOINT STOCK COMPANY, 2.

ERRATA.

Page 100, line 10, for profits read proofs.

„ 672, line 8, *from bottom, for direction read discretion.*





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